STATE OF ALABAMA

ALABAMA PUBLIC SERVICE COMMISSION
P O BOX 304260
MONTGOMERY, ALABAMA 36130-4260

JIM SULLIVAN PRESIDENT
JAN COOK ASSOCIATE COMMISSIONER
GEORGE C WALLACE, JR . ASSOCIATE COMMISSIONER

WALTER L THOMAS, JR
SECRETARY

May 5, 2004

NOTICE OF ARBITRATION PANEL RECOMMENDATION

Docket 28841

IN RE: Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc. pursuant to the Telecommunications Act of 1996.

Pursuant to Telephone Rule T-26(I) (2), please be advised that the arbitration panel in the above-styled docket has arrived at a recommendation. Said recommendation is posted on the Commission's web site at www.psc.state.al.us. Hard copies of such recommendation can be obtained by contacting the Commission Secretary's Office at 334-242-5218. Interested non-parties must submit any comments concerning the arbitration panel's recommendation within ten days of this notice.

Walter L. Thomas, Jr.
Secretary of the Commission

BEFORE THE
ALABAMA PUBLIC SERVICE COMMISSION

In re:	)	
Petition for Arbitration of	)	
ITC^DeltaCom Communications, Inc.	)	
with BellSouth Telecommunications, Inc.	)	**Docket No. 28841**
Pursuant to the Telecommunications	)	
Act of 1996	)	

ARBITRATION PANEL RECOMMENDATIONS

INTRODUCTION

This arbitration proceeding is pending before the Alabama Public Service Commission ("Commission") pursuant to Section 252(b) of the Telecommunications Act of 1996 (the "Act").[1] On January 24, 2003, ITC^DeltaCom Communications, Inc., d/b/a ITC^DeltaCom and d/b/a Grapevine (hereinafter "DeltaCom") filed a Petition for Mediation in Docket No. 28828. BellSouth filed its response to DeltaCom's request for mediation on January 31, 2003. The Commission appointed Ms. Judy McLean, Director of the Commission's Advisory Division as mediator. The parties met on February 6 and 20 of 2003, and mediated and resolved several issues.[2]

DeltaCom filed a Verified Petition for Arbitration of an Interconnection Agreement with BellSouth Telecommunications Inc., (hereinafter "BellSouth") pursuant to Section 252(b) of the Telecommunications Act of 1996 on February 7, 2003 (hereinafter referred to as the "Petition.") BellSouth filed its Answer on May 6, 2003

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[1] The Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 codified at 47 U.S.C. § 151 et.seq.

[2] Issues that were resolved in mediation included Issues 5, 7, 61, 65 and 69.

(hereinafter referred to as the "Response.") In its Petition, DeltaCom asked the Commission to arbitrate certain terms, rates, and conditions with respect to an interconnection agreement between itself as the petitioning party and BellSouth.

Pursuant to Commission Telephone Rule T-26(C), the Commissioners appointed the Honorable Mark G. Montiel, Honorable James E. Wilson, and Honorable Terry L. Butts as Arbitrators in this matter (hereinafter "Arbitration Panel" or "Panel.")

On April 4, 2003, DeltaCom submitted direct testimony of witnesses Jerry Watts, Steve Brownworth, Don Wood, and Mary Conquest. On May 6, 2003, BellSouth filed rebuttal testimony of John Ruscilli, Keith Milner, Ronald M. Pate, and Kathy Blake.

On May 28, 2003, BellSouth filed a Motion to Remove Issues from DeltaCom's Petition for Arbitration. The Arbitration Panel denied BellSouth's Motion on June 11, 2003. DeltaCom filed a Motion to Compel discovery on May 21, 2003. We granted in part and denied in part DeltaCom's Motion.

The Arbitration Panel conducted hearings on June 11 through 13, July 14 through 15, July 22 through 23, and September 23, 2003, regarding the unresolved arbitration issues, which are set forth in the Parties' Joint Issue Matrix ("Matrix") included in Appendix A. During and after the hearings, the Parties informed the Arbitration Panel that Issues 1, 2(d), 3-5, 7-8, 10, 11(b) and (c), 12-20, 22-24, 26-35, 38-43, 45, 48-55, 58, 61, 65, and 68-71 had been resolved or withdrawn from the arbitration hearing. These

are noted as such by the gray shaded areas on the Matrix. Accordingly, those issues are not addressed in this Order.

BellSouth and DeltaCom filed post-hearing briefs on December 31, 2003, reply briefs on January 13, 2004, and proposed orders on March 8, 2004.

FINDINGS AND CONCLUSIONS

ISSUE 2: DIRECTORY LISTINGS

a) Is BellSouth required to provide DeltaCom the same directory listing language it provides to AT&T?

b) Is BellSouth required to provide an electronic feed of the directory listings of DeltaCom customers?

c) Does DeltaCom have the right to review and edit its customers' directory listings?

Position of DeltaCom

2(a). DeltaCom states that it should be able to obtain the same directory listing language provided to other carriers including AT&T.

2(b). DeltaCom asserts that access to an electronic comparison of what was submitted versus what is being printed is in the best interest of both parties as there will be greater accuracy in customer directory listings.

2(c). DeltaCom states that it is blind to the actions between BellSouth and BAPCO, BellSouth's publishing affiliate; nevertheless, DeltaCom bears the financial responsibility to its end users. Thus, DeltaCom wants the right to review and edit its customers' directory listings in order to validate the accuracy of such listings.

DeltaCom further argues that directory listings are an unbundled network element (UNE) or interconnection service as BellSouth is required to provide white pages directory listings pursuant to Section 271 of the Telecommunications Act of 1996. Thus, DeltaCom can adopt directory listing language from any other interconnection agreement. DeltaCom provides its end user customer listings to BellSouth for inclusion in the local phone directory. Transcript of June 11-13, July 14-15 and 22-23, September 23 Hearing, page 994.[3] After DeltaCom provides its end user customer listings to BellSouth, some of these listings must be manually keyed by BellSouth personnel. All iterations are not viewable by DeltaCom. Id. BellSouth then provides this information to its affiliate, BellSouth Advertising and Publishing Company ("BAPCO"). DeltaCom argues that BellSouth should be required to provide these listings electronically either by: (1) providing a list of only the DeltaCom customers; or (2) providing the entire electronic list subject to a strict protective agreement that limits DeltaCom's usage and access to such records for validation purposes only.[4] BellSouth admitted that compliance with DeltaCom's request is technically feasible and is not prohibited by law. (T-1518-1519).

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[3] The hearing transcript citation format hereinafter will be as follows: "(T-[page number])."

[4] DeltaCom agreed it would sign such an agreement to ensure that the entire list was not placed in the hands of any sales entity. (T-1021).

Position of BellSouth

2(a). DeltaCom cannot adopt directory listing language from another interconnection agreement as it is not subject to Section 252(i). 47 U.S.C. § 252(i) only requires an incumbent local exchange carrier (ILEC) to make available "any interconnection, service, or network element" under the same terms and conditions as the original Interconnection Agreement. Accordingly, Directory Listings are not a Section 251 requirement subject to Section 252(i).

2(b). BellSouth is not required to provide an electronic feed of directory listings for DeltaCom customers.

2(c). DeltaCom should go to BellSouth Advertising & Publishing Company (BAPCO) to review and edit its listings.

BellSouth argues that DeltaCom cannot adopt language from another interconnection agreement regarding directory listings because the provision of directory listings is not a Section 251 requirement. BellSouth further asserts that DeltaCom's recourse is only with its affiliate BAPCO. BellSouth argues that DeltaCom has access to individual Customer Service Records ("CSRs").

Discussion of Issue 2

The Commission requires local phone companies pursuant to Telephone Rule T-9 to provide directory listings to Alabama consumers.[5] Pursuant to Section 271 of the Act,

[5] See Docket No. 26720 wherein the Commission has exclusive jurisdiction over white page listings and the free yellow page directory listing.

the incumbent local exchange carrier (ILEC) is required to provide white page directory listings for DeltaCom's customers.[6]

It is in the consuming public's best interest that directory listings are accurate. While BellSouth argues that DeltaCom has access to individual customer listings, DeltaCom argues that the customer service record ("CSR") will not reflect any BellSouth-created omissions or corrections or alterations made by BAPCO. DeltaCom argues that there are multiple points of errors that can occur during this process, enhancing the likelihood of listing errors on the BellSouth/BAPCO side. (T-989). DeltaCom also presented evidence through the testimony of Ms. Conquest that another ILEC – Century Tel – already provides an electronic feed of directory listings in the manner DeltaCom seeks. (T-1029). BellSouth agrees that it benefits Alabama consumers to have accurate listings (T-1519). BellSouth does not dispute that its refusal to provide this data electronically increases the risk of inaccurate listings and consumer dissatisfaction.[7]

In the parallel arbitration between the parties before the North Carolina Utilities Commission ("NCUC"), the NCUC recently found that "galley proofs should already

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[6] See Section 271 (c)(2(B) (viii).

[7] DeltaCom is willing to pay a reasonable, cost-based rate to receive the listings electronically. (T-1024). BellSouth provided an estimated cost of satisfying DeltaCom's request, but could not point to a cost study to justify the proposed rate. (T-1521-1522, 1524). Further, on cross-examination, BellSouth chided DeltaCom for not filing a New Business Request ("NBR") for electronic listings. (T-1018-1019). In response, DeltaCom ultimately filed an NBR on July 29, 2003, only to have BellSouth deny it on August 21, 2003, referring to BAPCO.

exist in electronic format if they are available in a paper version" and concluded that "ITC has the right to review and edit its customers' directory listings by using an electronic version of galley proofs." The NCUC noted that the responsibility for providing directories to end users lies with BellSouth, and stated, "[t]he fact that BellSouth chooses to contract with BAPCO to publish and distribute its directories should not absolve BellSouth of its obligations with regard to directories." [8]

Conclusion to Issue 2

Based upon the foregoing discussion, the Panel recommends that the Commission require BellSouth to provide DeltaCom the same rates, terms and conditions for directory listings that it provides to AT&T. In addition, we recommend that BellSouth provide DeltaCom an electronic copy of the directory listing information pursuant to a reasonable cost based rate. Further, BellSouth shall allow DeltaCom the ability to review and edit its own customers' directory listings.

ISSUE 6: FACILITY CHECK INFORMATION

Should BellSouth be required to provide to DeltaCom facility check information electronically in the same manner it does to BellSouth's retail operations?

Position of DeltaCom

BellSouth has been ordered to provide facility check information in three states and will only provide this to DeltaCom in Alabama if required to do so by the

[8] *In the Matter of Petition for Arbitration of ITC^DeltaCom Communications, Inc., with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996,* Docket No. P-500, Sub 18 at 16-17 (March 2, 2004.) ("NCUC Order.")

Commission. DeltaCom uses facility check information to coordinate orders with its customers and ensure that facilities are available to fill those orders. Facility checks provide information that helps DeltaCom set reasonable and accurate expectations with customers regarding when orders will be completed. As noted by DeltaCom witness Conquest.

> "When a customer requests a service that requires new facilities, new wire, in the states that provide the facility check, prior to returning the firm order confirmation which contains the due date information, BellSouth has checked to assure us that we have a facility to serve this customer, so that when I make an appointment with you, I have the information and knowledge of knowing the facility is there, ready for my use. . . . We want to be there with as much information and to provide the best quality service we can provide. So we feel that the consumer in Alabama deserves this."

(T-984).

BellSouth's systems are regional. If one commission with the BellSouth region requires a change in these systems, BellSouth has the ability to make those changes on a regional basis. The Florida Public Service Commission, the Tennessee Regulatory Authority, and the North Carolina Utilities Commission already have ordered BellSouth to provide facility check information prior to sending a Firm Order Confirmation (FOC).[9] (T-1151). DeltaCom contends that BellSouth has conceded there is no technical barrier to providing facility check information. (T-1313). It further argues that BellSouth has

[9] See FPSC Docket No. 01-1819-FOF-TP, order released September 10, 2001; TRA Docket No. 97-00309, order released August 8, 2002; NCUC Docket P-100, Sub 133K, order released May 29, 2003.

admitted that facility checks can be important from a consumer perspective, and has acknowledged that if BellSouth provides a due date for order completion and then facilities are not available when the technician tries to provision the order, it can have a negative impact on DeltaCom and the consumer. (T-1310).

Position of BellSouth

BellSouth argues that it does not provide facility check information to itself; therefore, BellSouth is treating DeltaCom on a nondiscriminatory basis. (T-1309). BellSouth also argues that the other state commissions that have ordered the provision of facility check information ordered BellSouth to do so in the context of performance measures dockets; therefore, it is inappropriate to order the same in a Section 252 arbitration. (T-1311). Finally, BellSouth argues that the firm order confirmation ("FOC") timeliness metric will be impacted by a facility check information requirement. (T-1313-1314)

Discussion of Issue 6

The Parties are in agreement that facility check information is beneficial and can prevent customer dissatisfaction. There is no dispute that BellSouth is currently providing facility check information in other states and this Commission previously found in Docket 25835 that BellSouth's operational support systems (OSS) are regional in

nature.[10] BellSouth agreed that the provision of the facility check is technically feasible. BellSouth's concern appears to be that BellSouth will be penalized for failing to meet the FOC timeliness measure when it provides a facility check. However, BellSouth provided no probative evidence in support of this argument at the hearing. Indeed, BellSouth offered no evidence of any problems meeting the FOC timeliness metric in Florida or Tennessee where this requirement is already in place, other than its witness's unsupported reference to "empirical data" he had reviewed outside the hearing but was not including in his testimony. (T-1315-1316).[11] BellSouth admitted that it could seek relief or a change to the FOC timeliness metric in this Commission's ongoing performance measures docket. (T-1368-1369).[12] DeltaCom also expressed a willingness to forego any resulting penalties for a probationary time period (T-1052).

Conclusion to Issue 6

Based upon the foregoing discussion, we conclude that facility checks are beneficial and can prevent customer dissatisfaction. The Panel recommends to the

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[10] *In Re: Petition for Approval of a Statement of Generally Available Terms and Conditions Pursuant to § 252(f) of the Telecommunications Act of 1996 and Notification of Intention to File a Petition for In-Region InterLATA Authority with the FCC Pursuant to Section 271 of the Telecommunications Act of 1996*, Docket No. 25835 at171 (rel. July 11, 2002).

[11] BellSouth made the argument about FOC timeliness to the other state commissions. None of the three states referenced above altered the FOC timeliness metric in response to BellSouth's arguments.

[12] BellSouth would have the burden in that docket of proving an impact that would necessitate a change.

Commission that it order BellSouth to make the necessary changes to provide facility check information to DeltaCom in Alabama no later than six months after the effective date of the Commission's Order.

ISSUE 9: OSS INTERFACE

Should BellSouth be required to provide interfaces for OSS to DeltaCom which have functions equal to that provided by BellSouth to BellSouth's retail division?

Position of DeltaCom

The Commission should order the parties to include the following language in the interconnection agreement:

> BellSouth will provide to ITC^DeltaCom access to all functions for pre-order that are provided to the BellSouth retail groups. Systems may differ, but all functions will be at parity in all areas, i.e., operational hours, content performance. All mandated functions, i.e., facility checks, will be provided in the same timeframes in the same manner as provided to BellSouth retail centers.

DeltaCom contends this proposed language is clearer than the language promoted by BellSouth and that BellSouth wants either no language or a vague reference to nondiscriminatory access. DeltaCom states that it seeks more definition to avoid future disputes. Limiting the contract to general recitations of the Act is not particularly useful in governing the operations of the parties according to DeltaCom. One critical purpose of an interconnection agreement is to give application to the Act. Indeed, the parties are before the Commission in part because the language of the Act is not sufficiently precise to resolve certain operating issues.

The language put forward by DeltaCom acknowledges that BellSouth should be required to provide interfaces for Operational Support Systems ("OSS") that are equal to that enjoyed by BellSouth's retail division. DeltaCom contends that BellSouth takes the position that because the Commission gave it a favorable Section 271 recommendation, it should not have to include DeltaCom's proposed language. Thus, BellSouth's argument is that because of the Section 271 cases, DeltaCom's proposed language is "additional and unessential . . . ." (T-1276). DeltaCom counters that reliance on the 271 recommendations assumes the telecommunications industry is static. It argues that BellSouth must agree that systems change with new technology and different demands.

Position of BellSouth

BellSouth argues that DeltaCom's language is unnecessary (T-1377-1378). BellSouth also argues that by accepting DeltaCom's language, BellSouth will be required to provide "functionalities" that it is not required to provide such as credit information or customer profiling. (T-1372-1379) The only two specific examples provided by BellSouth of "functionalities" that it asserts it is not required to provide were credit checks performed by BellSouth's retail division and access to market-sensitive data. (T-1373-1376).

Discussion of Issue 9

Operational Support Systems are critical to timely processing customer orders for service. DeltaCom's basic premise is that it should be afforded access to functions that are available to BellSouth's retail group.

Conclusion to Issue 9

The Panel recommends that the Commission order the parties to incorporate language in the interconnection agreement which requires BellSouth to provide OSS interfaces with the same functionalities as those provided to BellSouth's retail division with the exception that BellSouth is not obligated to provide DeltaCom with BellSouth's developed market or customer profiling data.

ISSUE 11(a): ACCESS TO UNEs (COMPLIANCE WITH STATE LAW)

a) Should the interconnection agreement specify that the rates, terms and conditions of the network elements and combinations of network elements are compliant with state and federal rules and regulations?

Position of DeltaCom

DeltaCom seeks inclusion of language that expressly refers to state law. A state law reference is appropriate in Alabama because of the pro-consumer and pro-competitive laws and regulations adopted by the Alabama legislature and the Commission. [13] The interconnection agreement should specify that BellSouth's rates, terms, and conditions for network elements and combinations of network elements are compliant with both state and federal rules and regulations. State commissions are given

[13] Ala Code §37-1-31 (1975) provides the Commission with exclusive jurisdiction over rates, service regulations and equipment. Additionally, the Commission has general supervision of utilities which includes the manner in which the utility property, plant, and facilities is leased, managed, and operated pursuant to Ala. Code § 37-1-32. Additionally, § 37-1-31 and 37-1-56 vest the commission with very broad jurisdictional powers and authority to regulate utilities. *Graddick v. Alabama Pub. Serv. Comm'n*, 441 So. 2d 586 (Ala. 1983). See also, *All Telephone Companies Operating in Alabama, Generic Hearing on Local Competition,* Report & Order, Docket 24472 consolidated with Dockets No. 24499,24030,24865 (rel. Sept. 1995) ("Local Competition Order").

significant authority over interconnection agreements, as evidenced by the existence of this docket. As long as the decisions of the Commission are not inconsistent with, and do not frustrate the implementation of Section 251 of the Act, they will not be preempted and will remain binding on BellSouth and DeltaCom.[14]

DeltaCom anticipated that BellSouth will cite language in the FCC's recent Triennial Review Order ("Triennial Order")[15] indicating that states cannot create new UNEs or re-establish UNEs that the FCC eliminated, and will argue that this makes state law irrelevant. See Triennial Order, ¶¶ 194-195. It argues this is wrong for two reasons grounded in state law. First, Section 252(e)(3) of the Telecommunications Act clearly preserves states' authority to establish or enforce other requirements of state law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements. Furthermore, in several instances, the Triennial Order encourages state commissions to engage in arbitration hearings or other proceedings to ensure that unbundled network elements are available to

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[14] See Section 252(e) wherein any interconnection agreement must be submitted for approval to the State Commission and nothing in this section shall prohibit a State Commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards.

[15] The Circuit Court for the District of Columbia recently vacated and remanded certain portions of the FCC's Triennial Review Order. *USTA v. FCC*, No. 00-1012, U.S. App. D.C. (March 2, 2004). The Court stayed the effectiveness of its order for 60 days. However, to the extent there is no FCC rule or regulation in place, then the State Commission cannot be preempted and pursuant to the authority granted by § 37-1-31-32, the Commission has the authority to establish rates, terms and conditions for service.

competitive carriers. See Triennial Order, ¶¶ 385, 638. Second, state law still applies to govern the parties' relationship. The Commission has significant independent state authority over telecommunications services and federally mandated authority over the interconnection agreement even if certain limitations are placed on that authority by pronouncements of the FCC.

Position of BellSouth

BellSouth's stated position is as follows: BellSouth contends that the interconnection agreement should specify that the rates, terms and conditions of network elements and combinations of network elements should be compliant with federal and state rules pursuant to Section 251 of The Act. The Interconnection Agreement is an agreement under Section 251. If a state commission orders BellSouth to provide access to network elements pursuant to any authority other than Section 251 (for example under a separate state statutory authority) those elements should not be required to be included in a Section 251 agreement.[16] BellSouth also stated on cross-examination that BellSouth will adhere to state law; however, BellSouth opposes a requirement of adhering to state law incorporated into a document. [T. 1529-1530].

Discussion of Issue 11(a)

Interconnection agreements must comply with state and federal law. To the extent there is a conflict between federal and state law, then federal law applies. To the extent there is not a conflict between federal and state law, the Act provides the Commission the

[16] From the BellSouth Position on the Joint Issues Matrix for Issue 11(a).

authority as part of the arbitration and approval of the interconnection agreement to preserve and enforce state telecom regulations. The fact that portions of the TRO have recently been vacated highlights the importance of Alabama state laws. Indeed, pursuant to Ala. Code § 37-1-31 (1975), the Commission has been delegated by the state legislature the exclusive rights, powers, authority, jurisdiction, and duties concerning the regulation of public utilities operating in Alabama. However, the Commission must exercise that power consistent with "the Constitution of the State and of the United States." The authority of the Commission to regulate rates, service regulations and equipment is exclusive, but must also be exercised consistent with federal law.

Conclusion to Issue 11(a)

The Panel recommends that the parties include language in the interconnection agreement that requires compliance with state and federal law.[17]

ISSUE 21: DARK FIBER AVAILABILITY

Does BellSouth have to make available to DeltaCom dark fiber loops and transport at any technically feasible point?

Position of DeltaCom

DeltaCom seeks access to dark fiber at any technically feasible point, not just at DeltaCom collocation sites. DeltaCom argues that if BellSouth's argument is adopted then the Commission will be endorsing a disparity between the parties regarding access

[17] In the parallel arbitration between the parties in Georgia, the Georgia Commission agreed that interconnection agreements must comply with state law, subject of course to any direct conflict with federal law. DeltaCom does not seek any relief inconsistent with, or prohibited by, federal standards.

to fiber that is easily called into service for the benefit of Alabama consumers. DeltaCom points to authority from other state commissions that support the provision of dark fiber at any technically feasible point. [18]

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[18]Most if not all of these state decisions are cited in the FCC's recent Triennial Review Order in footnotes 1189, 1190, 1191, and 1934.

Application by Pacific Bell Telephone Company (U 1001 C) for Arbitration of an Interconnection Agreement with MCImetro Access Transmission Services, L.L.C. (U 5253 C) Pursuant to Section 252(b) of the Telecommunications Act of 1996, A.01-01-010, Final Arbitrator's report Cal. PUC, July 16, 2001 at 130, 139.

Petition of El Paso Networks, LLC for Arbitration of an Interconnection Agreement with Southwestern Bell Telephone, Docket No. 25188, at 139, TX PUC, July 31, 2002 ("EPN Texas Revised Arbitration Award").

TAC 12 – Petition of Yipes Transmission, Inc. for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Verizon Washington, DC, Inc., Order No. 12286, Order on Reconsideration, (DC PSC Jan. 4, 2002) ("*D.C. Dark Fiber Order*") at ¶ 62, 87.

Re: AT&T Communications of Indiana, Inc., Cause No. 40571-INT-03, Slip Opinion, at 79, 129-130 (Nov. 20, 2000) ("Indiana Order").

In re: Verizon-Rhode Island's TELRIC Studies - UNE Remand, Docket No. 2681, Report and Order, at 19, 22-23 (Rhode Island PUC, Dec. 3, 2001) *("RI Dark Fiber Order")* ("Verizon is required to splice dark fiber at any technically feasible point on a time and materials basis, so as to provision continuous dark fiber through one or more intermediate central offices without requiring the CLEC to be collocated at any such offices."); Jan. 29, 2002 Tr. at 18:21-186:3.

New England Telephone and Telegraph Company d/b/a Bell Atlantic Massachusetts, Decision D.P.U./D.T.E. 96-83, 96-94-Phase 4-N, at 33 (Mass. DTE Dec. 13, 1999) ("We impose no collocation requirement ... it is technically feasible and consistent with industry practice to lease dark fiber at splice points.") ("Mass. DTE Phase 4N Order") (emphasis added); *New England Telephone and Telegraph Company d/b/a NYNEX, et al.*, Decision D.P.U. 96/73-74, 96/80-81, 96-84-Phase 4-R Order at 4-5 (Mass. DTE Aug. 17, 2000).

DeltaCom also references the FCC's explicit endorsement of the efforts of other state commissions in this regard. Referring to these decisions, the FCC in its Triennial Order recognized the efforts of the state commissions to address ILECs' attempts to restrict access to dark fiber:

> We note that many state commissions have directly addressed these issues through arbitrations and other proceedings. For example, states have addressed the pre-ordering and ordering processes including determinations about what information incumbent LECs must make available about the location of dark fiber, the extent to which incumbent LECs must allow or perform splicing and other preparatory work, and access to dark fiber transport that traverses through intermediate central offices where the competitive LEC is not collocated. *We recognize the hard work of the state commissions to make dark fiber meaningfully available and endorse such efforts here.*

Triennial Order, ¶ 385 (footnotes omitted) (emphasis added). The FCC went on to state:

> The requirement we establish for incumbent LECs to modify their networks on a nondiscriminatory basis is not limited to copper loops, but applies to all transmission facilities, including dark fiber facilities. For example, several state commissions have rejected incumbent LEC attempts to deny competitive access to dark fiber where a competitive LEC seeks access to the network in the same manner as the incumbent LEC [footnote omitted]. Incumbent LECs must make the same routine modifications to their existing dark fiber facilities for competitors that they make for their own customers – including the work done on dark fiber to provision lit capacity to end users. Although the record before us does not support the enumeration of these activities in the same detail as we do for lit DS1 loops, *we encourage state commissions to identify and require such modifications to ensure nondiscriminatory access.*

Triennial Order, ¶ 638 (emphasis added).

Finally, DeltaCom argues that BellSouth has already provided dark fiber at locations other than a collocation site.

Position of BellSouth

BellSouth argues that "BellSouth's definitions of dark fiber comport with the definitions of dark fiber loops and dark fiber transport under the FCC's rules." (T-1849) BellSouth cites 47 C.F.R. 51.319(a)(1) and 47 C.F.R. 51.319(d)(1) as support for its position that it is only required to make dark fiber loops available at the demarcation point associated with DeltaCom's collocation arrangements within BellSouth central offices. In essence, BellSouth argues that the "loop" definition provided for by the FCC does not include fiber without electronics on either end – that is, not connected to a central office of BellSouth or DeltaCom Point of Presence. BellSouth argues that DeltaCom is seeking a new unbundled network element.

BellSouth admits that it has previously provided DeltaCom with dark fiber at locations other than a collocation site, but BellSouth's witness Mr. Milner states that to require BellSouth to now provide dark fiber at sites other than at a collocation site would translate to "no good deed goes unpunished." [T. 1848-1849]

Discussion of Issue 21

The FCC's rules codified at 47 C.F.R 51.311 (d), 51.321(a)–(c), and 51.307(a) require BellSouth to offer nondiscriminatory access in accordance with Rule 51.311 and

Section 251(c)(3) of the Act. Rule 51.311(d) provides that "previous successful access to an unbundled element at a particular point in a network, using particular facilities is substantial evidence that access is technically feasible at that point..." In addition, Rules 51.321(a)–(c) provide that BellSouth is required to provide any technically feasible method of obtaining interconnection or access to unbundled network elements at a particular point. The FCC rules and BellSouth's previous successful provisioning of dark fiber to DeltaCom at non-collocation sites weighs heavily in favor of requiring such provisions in the future.

BellSouth is legally required pursuant to Rules 51.311(d), 51.321(a)-(c), and 51.307 to provide access to unbundled elements at any technically feasible point on terms and conditions that are just, reasonable and nondiscriminatory. BellSouth's prior provision of dark fiber at a manhole for DeltaCom is substantial evidence that it is technically feasible to provide dark fiber at locations other than a collocation site. There is no dispute that BellSouth calls into service dark fiber for itself.[19] We also note that the Georgia and North Carolina Commissions have concluded that BellSouth must allow DeltaCom to access unused dark fiber facilities at any technically feasible point in BellSouth's network, not merely at DeltaCom's collocation sites located in BellSouth's wire centers.[20]

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[19] T 1862-1869.

[20] NCUC Order at 27.

Conclusion to Issue 21

The Panel recommends that BellSouth should be required to allow DeltaCom to access dark fiber facilities at any technically feasible point in BellSouth's network, not merely at DeltaCom's collocation sites located in BellSouth's wire centers. Accordingly, the Panel recommends that BellSouth and DeltaCom incorporate into their interconnection agreement the appropriate language that sets forth these provisions.

ISSUE 25: PROVISION OF ADSL WHERE DELTACOM IS LOCAL UNE-P PROVIDER

Should BellSouth continue providing an end-user with ADSL service where DeltaCom provides UNE-P local service to that same end user on the same line?

Position of DeltaCom

DeltaCom's position is that BellSouth should be ordered to continue to provide its brand of digital subscriber line service ("DSL") to customers who move from BellSouth's voice service to DeltaCom's service that it provides over the UNE Platform ("UNE-P"). In support of this contention, DeltaCom advances a number of arguments: (1) because it is technically feasible for BellSouth to do this, it should be ordered to do so; (2) because such an order is not prohibited by law, the Commission should order it; (3) such an order would benefit Alabama consumers by giving them choice; and (4) BellSouth's position is anticompetitive, in that it presents a disincentive for customers to switch to DeltaCom's UNE-P service, and in that it constitutes an unlawful "tying arrangement" under antitrust laws.

Position of BellSouth

BellSouth disputes each of DeltaCom's contentions. (1) While it may be technically *possible* for BellSouth to continue to provide its Fast Access® DSL service in this fashion, the service was not engineered to be provided over the UNE-P, and substantial modifications to BellSouth's systems would be necessary, costs that DeltaCom will not pay; (2) The FCC has repeatedly stated that incumbent local exchange carriers are not required to provide DSL service over the UNE-P. This Commission, as well, has echoed the FCC's stance. For example, in the order recommending to the FCC that BellSouth be granted authority to provide interLATA service, this Commission noted that ". . . BellSouth is correct in pointing out that the FCC held in its local competition order that once the loop and port are used to provide line splitting as opposed to simple voice arrangements, the UNE-P no longer exists . . . because the arrangements are fundamentally different." (Tr. 1062-1063). So, once the high frequency portion of the line that is used to provide DSL is split apart from the lower frequencies over which voice service travels, the UNE-P arrangement *no longer exists*. Thus, because there is no legal justification for it, BellSouth argues that this Commission cannot lawfully require BellSouth to provide its DSL service over a UNE-P arrangement. Indeed, BellSouth argues, both the FCC and the courts have held that forced provision of an ILECs' DSL service over UNE-P would actually impede competition in the high-speed market by

acting as a disincentive for CLECs to develop their own offerings.[21] (3) BellSouth argues that there is no competent evidence in the record that BellSouth's policy not to provide DSL on a line served by a CLEC via the UNE-P has impeded consumers' ability to choose an alternative local service provider, particularly when competition in the local market in Alabama is flourishing. (4) Consumers have a myriad of choices for broadband services, and requiring BellSouth to, in effect, unwillingly co-market its DSL service (which it developed with its own risk capital) with DeltaCom's voice service is an unwarranted intrusion into what Congress has determined should be a market that should be free from state commission interference. Finally, other commissions (including the South Carolina and Tennessee Commissions) and at least one federal court that has looked at the issue[22] have concluded that BellSouth's position is neither anticompetitive nor unlawful.

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[21] The corollary is that BellSouth's position has actually led to increased competition in the broadband market, as evidenced by several CLECs' decision to market their own DSL offerings.

[22] See *Levine v. BellSouth Corporation*, Case No. 03-202740CIV-GOLD/SIMONTON (slip op. Jan. 27, 2004) (BellSouth's policy does not amount to an unlawful tying arrangement, and noting that the FCC has examined and affirmatively rejected the claim of competitive benefits of imposing as a regulatory duty the obligation to provide DSL over UNE-P) (citing *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, No. 02-682, 2004 LEXIS 657, 2004 WL 51011 (U.S., January 13, 2004)).

Discussion of Issue 25[23]

The Panel concludes that the Commission should reject DeltaCom's position.

The FCC addressed the "DSL over UNE-P Issue" in the TRO as part of its discussion concerning the continued need for unbundling the high frequency portion of the loop (HFPL) for Line Sharing:

> Since some incumbent LECs have thus far refused to provide xDSL service to customers that obtain voice service from a competitive LEC, by necessity, any of the over 11 million voice customers served by competitive LECs who seek xDSL service would have to obtain that service from a competing carrier. (footnotes omitted).

(TRO ¶ 259). The FCC stated that it could no longer find that CLECs are unable to obtain the HFPL from other CLECs through line splitting, citing Covad's increasing use of line splitting with carriers such as AT&T. (*Id.*). Thus, the FCC has reconfirmed the existence of the "no DSL over UNE-P" practice, did not express any concern or displeasure regarding this practice, essentially found no "impairment" in the UNE sense of the word, and, indeed, cited that practice in support of its decisions to phase out Line

[23] Facilitator Mark G. Montiel dissents from the Discussion of and Conclusion to Issue 25. The Dissent is included as Appendix B hereto.

Sharing while continuing Line Splitting obligations.[24] Importantly, the D.C. Circuit Order upheld the portion of the TRO that did away with line sharing. Slip op at 44-46.

The FCC also rejected the "tying arrangement" argument advanced by DeltaCom and other CLECs in the TRO. CompTel, for example, had requested that the Commission unbundle the low frequency portion of the loop ("LFPL") in order to end the "anti-competitive tying arrangements" engaged in by incumbent local exchange carriers ("ILECs"). CompTel Comments, p. 43. CompTel was referring to the fact that ILECs "have tied their local voice services with their xDSL products." (*Id.*) "As a result, a customer that wishes to obtain xDSL service from the ILEC while obtaining local voice service from a competing carrier often is rejected by the ILEC." (*Id.*)

In rejecting CompTel's argument, the FCC found:

> [U]nbundling the low frequency portion of the loop is not necessary to address the impairment faced by requesting carriers because we continue (through our line splitting rules) to permit a narrowband service-only competitive LEC to take

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[24] Recall the language of the TRO, at para. 195 of that Order :

> . . . If a decision pursuant to state law were to require the unbundling of a network element for which the Commission has either found no impairment – and thus found that unbundling that element would conflict with the limits in section 251(d)(2) – . . . we believe it unlikely that such decision would fail to conflict with and "substantially prevent" implementation of the federal regime, in violation of section 251(d)(3)(C).

As BellSouth argues, any decision by the Commission that requires BellSouth to provide DSL over a UNE-P arrangement under the guise of "state law" would directly conflict with the determination made by the FCC with regard to line splitting and line sharing.

> full advantage of an unbundled loop's capabilities by partnering with a second competitive LEC that will offer xDSL service.

(*Id.*) Furthermore, in decisions predating the TRO, the FCC also concluded that BellSouth has no obligation to provide DSL service over a competitive LEC's leased facilities as DeltaCom seeks. For example, in its *Memorandum Opinion and Order* released September 18, 2002, WC Docket No. 02-0150 (*BellSouth Five-State 271 Application*) at ¶64, the FCC reiterated:

> As we stated in the Georgia/Louisiana Order, an incumbent LEC has no obligation, under our rules, to provide DSL service over the Competitive LEC's leased facilities. Moreover, a UNE-P carrier has the right to engage in line splitting on its loop. As a result a UNE-P carrier can compete with BellSouth's combined voice and data service over the UNE-P loop in the same manner. (footnotes omitted)

Nothing has changed since the FCC consistently has spoken about this issue in each of BellSouth's 271 applications. DeltaCom has presented no factual basis or legal argument justifying its demand that the Commission order BellSouth to do precisely what the FCC has said it need not do. Such an obligation would place a regulatory requirement on BellSouth above and beyond the obligations imposed by the 1996 Act, as DSL is not a telecommunications service. In this regard, DeltaCom's own witness conceded that DSL is an enhanced information service. (Tr. 1057) She affirmed that this Commission does not regulate the service. (Tr. 1057) For the Commission to order BellSouth to provide the service would be a *de facto* regulation of an information

(enhanced) service, something that Congress has dictated is not within the jurisdiction of the state commissions. *See In re: Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards*, 6 FCC Rcd 7571 (1991).

DeltaCom has an option – if it chose to use it – to permit its customers to enjoy BellSouth's DSL product while subscribing to DeltaCom's voice service. That option is the "resale" option. For its own business and marketing reasons, which are valid (but which come with a cost), DeltaCom has chosen not to pursue that option. It has also not chosen the option of teaming with a DSL provider on a line-splitting basis. It has not referred its customers to "intermodal" broadband offerings, such as cable modems or satellite. Instead, it is pursuing its own offering in Alabama, a situation that appears to be a pro-competitive outcome (there will be yet another DSL provider in Alabama) spurred by BellSouth's policy.

The idea that BellSouth should be forced to offer standalone DSL service in the name of consumer choice is misguided. While customers should be free to choose their most preferred combination of services and service providers from among those being offered, there can never be any circumstance—and there are none in unregulated, competitive markets—in which consumers (or competitors purporting to speak on behalf of consumers) can *force* unwilling suppliers to enter into specific selling arrangements with them. That the customer may prefer a combination of services and service providers that is not offered does not mean the customer is being "punished," as DeltaCom claims.

DeltaCom seeks to serve its own self-interest by forcing BellSouth to supply a service[25] when it is not in its rational economic interest to do so, which is the case with standalone DSL service. Arguably, DeltaCom's own business decisions are the only thing limiting their voice customers' choices for internet access.

To the extent DeltaCom is asking the Commission to dictate the rates, terms, and conditions by which BellSouth offers FastAccess or BellSouth's wholesale DSL service (which is a component of FastAccess service), that request is also beyond the Commission's jurisdiction. That is because FastAccess is unregulated, and wholesale DSL service is an interstate telecommunications service over which the FCC, and not the Commission, has jurisdiction. In fact, in an order addressing BellSouth's wholesale DSL service, the FCC found that this offering permits "Internet Service Providers (ISPs) to provide their end user customers with high-speed access to the Internet" and is an *"interstate service"* that is *"tariffed at the federal level."* *See Memorandum Opinion and Order, In re: BellSouth Telecommunications, Inc., BellSouth FCC Tariff No. 1*, FCC 98-317 at ¶ 1 (Nov. 30, 1998) (emphasis added); *see also Memorandum Opinion and Order, In the Matter of GTE Telephone Operating Cos.* GTOC Tariff No. I, 13 F.C.C. Rcd 22,466 at ¶ 1 (October 30, 1998). As a result, the Commission lacks the jurisdiction to grant the relief DeltaCom is seeking.

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[25] And, because the customer who subscribes to BellSouth's DSL service is BellSouth's customer, DeltaCom does not want to pay for BellSouth to reconfigure its systems to keep up with DSL over UNE-P arrangements, should BellSouth find it in its economic interest to do so. (Tr. 1066)

Taken to an extreme, DeltaCom's position could be used to require BellSouth to make available any unregulated service to any CLEC, regardless of whether the CLEC is competing via UNE-P, unbundled loops, or even resale. For example, if the Commission were to accept DeltaCom's position in this case, another CLEC that had decided not to invest in voice mail could insist that BellSouth be required to provide its voice mail services on a standalone basis. And this argument would not be limited to BellSouth's existing unregulated services. At a time when the Commission has clearly indicated its preference for a competitive market, with less regulation, not more, such a ruling would set Alabama on the wrong course.

The consequences of such a ruling should be obvious. The net effect would be to discourage investment by penalizing the company that has taken all the risk and shouldered all the burden of developing these services, while rewarding carriers that have decided to invest little, if anything, in Alabama.

Conclusion to Issue 25

The Panel believes BellSouth's policy of requiring that a customer receive local voice service from BellSouth in order to receive BellSouth's DSL service is not anticompetitive. Further, the Panel believes that sufficient alternatives exist to allow customers a choice of services so that BellSouth's policy will have little effect on a customer's choice of provider of voice service. Thus the Panel recommends that the

Commission determine BellSouth is not required to continue to provide its FastAccess service to a customer who changes his or her voice provider to DeltaCom.

ISSUE 36: UNE/SPECIAL ACCESS COMBINATIONS

a) Should DeltaCom be able to connect UNE loops to special access transport?

b) Does BellSouth combine special access services with UNEs for other CLECs?

Position of DeltaCom

In the current interconnection agreement, DeltaCom may interconnect special access transport to UNE loops. (T-1211). Moreover, BellSouth admits that this request by DeltaCom is technically feasible. (T-1210). BellSouth asks the Commission to remove this language from the agreement for purposes of the contract at issue in this case. DeltaCom points out that BellSouth has cited to what it claims is an FCC prohibition on "commingling" as support for this position. However, DeltaCom argues the "commingling" restriction mentioned in the FCC's Supplemental Clarification Order applied to combining loop and transport UNE combinations with tariffed services; therefore, BellSouth's position would not have been supported by the FCC.

The Triennial Order addresses this issue by expressly approving commingling. Citing this, DeltaCom questions why BellSouth will not settle this issue.[26] DeltaCom argues that this portion of the Triennial Order is not vacated. The FCC held that CLECs may connect, combine or otherwise attach UNEs and UNE combinations to wholesale

[26] The recent opinion released by the Circuit Court for the District of Columbia did not vacate or remand the TRO's finding that commingling is permitted.

services (*e.g.*, switched and special access). Triennial Order, ¶ 579. The FCC also required ILECs to perform the necessary functions to effectuate such commingling upon request. Id. CLECs also are allowed to commingle tariffed and UNE services. Triennial Order, ¶ 584. DeltaCom contends that BellSouth's position has been fully rejected by the FCC, and that the Commission should order that language allowing DeltaCom to combine UNEs and UNE combinations with wholesale services be included in the interconnection agreement.[27] In the parties' North Carolina, Georgia, and Tennessee arbitrations, the Commissions have agreed that the issuance of the Triennial Order compels BellSouth to permit commingling.

Position of BellSouth

In its prefiled testimony BellSouth argues that there is no requirement for an ILEC to combine UNEs with tariffed services. BellSouth cited paragraph 28 of the June 2, 2000 Supplemental Order Clarification as support for its position that the FCC prohibits commingling. BellSouth stated that this issue is being addressed by the FCC in its Triennial Review. BellSouth argues that commingling cannot take place until after the nine months hearings in the Triennial Review Order ("TRO") are concluded.

[27] DeltaCom argues it was disingenuous for BellSouth to ignore the FCC's announced decision of February 20, 2003 that it would clear the way for commingling in the Triennial Order. (T-1208: "You know, we all have an idea based on what the press release said that they may do, but there's also been further press releases or news bits that have come out that say, you know, maybe it's not going to be like they said it was, and there's been some – you know, may be changes that have been made once the final order – the ink dries.") According to DeltaCom, BellSouth's position is completely unsupportable at this point.

Discussion of Issue 36

Regardless of whether commingling is allowed in the existing agreement between the Parties, the *TRO* renders this argument moot. Also while BellSouth's testimony that commingling is not allowed may have been correct prior to issuance of the *TRO*, the FCC has eliminated its commingling restriction.[28] The FCC found that commingling is required.

The D.C. Circuit Court of Appeals decision leaves the FCC's finding intact. The FCC held that CLECs may connect, combine, or otherwise attach UNEs and UNE combinations to wholesale services (e.g., switched and special access). *TRO*, at Paragraph 584. Therefore, BellSouth should allow DeltaCom to connect UNE loops to special access transport.

Conclusion to Issue 36

The Panel concludes that the recently issued Triennial Review Order of the Federal Communications Commission now resolves this issue by expressly approving commingling. The Panel notes that the commingling issue is not the subject of the appeal of the Triennial Review of the FCC and has not been stayed by the D. C. Circuit Court of Appeals. Therefore BellSouth should allow DeltaCom to connect UNE loops to special access transport under the provisions of the TRO. Thus the Arbitration Panel recommends that the Commission require language in the interconnection agreement

[28] See paragraphs 579-81 of the *TRO*.

between BellSouth and DeltaCom which allows DeltaCom to combine UNEs and UNE combinations with BellSouth wholesale services.

ISSUE 37: CONVERSION OF SPECIAL ACCESS LOOP TO STAND-ALONE UNE LOOP

Where DeltaCom has a special access loop that goes to DeltaCom's collocation space, can that special access loop be converted to a UNE loop?

ISSUE 57: RATES/CHARGES FOR CONVERSION OF SPECIAL ACCESS TO UNE-BASED SERVICE

a) Should BellSouth be permitted to charge DeltaCom for converting customers from a special access loop to a UNE loop?

b) Should the Agreement address the manner in which the conversion will take place? If so, must the conversion be completed such that there is no disconnect and reconnect (i.e., no outage to the customer)?

Position of DeltaCom

DeltaCom contends that the FCC has concluded that CLECs may convert existing access service arrangements to stand-alone UNEs and vice versa, and has affirmed that these conversions should be seamless and not affect end user perceptions of service quality. Triennial Order, ¶ 586. The FCC also prohibited the imposition of untariffed termination charges, re-connect and disconnect fees, and nonrecurring charges associated with establishing service for the first time. Triennial Order, ¶ 587. Although the FCC did not establish a specific timeframe for conversions, it directed carriers to include such timeframes in interconnection agreements and suggested that effectuating price changes as of *the next billing cycle* would be considered reasonable. Triennial Order, ¶ 588.

Clearly this language in the Triennial Order underscores the FCC's intention that the RBOCs comply with the conversion quickly.

Contrary to BellSouth's assertions DeltaCom contends that the FCC did not say that competitive LECs would be prohibited from converting special access loops to stand-alone UNEs until the nine months impairment cases are completed. Indeed, it stated that it would be reasonable for such processes to be in place as quickly as the next billing cycle. The existence of the impairment cases does not mean that UNEs have disappeared in the interim.

The Triennial Order notwithstanding, DeltaCom argues that BellSouth's policy has been unjustified from the beginning. It points out that BellSouth already has a process to convert special access services to EELs and has admitted it was technically feasible to have a process for conversions to stand-alone UNEs. (T-1230-1232). BellSouth further admitted that conversions do not require breaking apart facilities, and that the same circuit is in place and carrying traffic before and after the conversion. (T-1220-1222). The ultimate difference is the rate paid by the CLEC. (T-1222). DeltaCom argues that BellSouth does not want to offer elements to DeltaCom at the Commission-approved rates.

Position of BellSouth

BellSouth argues that "the ultimate issue of whether a conversion is allowed will be dependent upon further state proceedings identifying which elements will remain UNEs and whether CLECs meet certain eligibility requirements" and cites ¶ 586 of the Triennial Order for support. BellSouth also argues that it is not required to perform conversions of special access to UNEs except for specific combinations.

Discussion of Issues 37 and 57

Based upon our review of the *TRO*, we believe that the FCC has clearly allowed carriers to convert standalone UNEs and UNE combinations to wholesale services and vice versa, provided that CLECs meet the applicable eligibility criteria.[29] In *TRO* Paragraph 579 (from Part VII.A.2.c. - General Commingling Issues from Transmission Facilities) and in *TRO* Paragraphs 585, 586, and 588 (from Part VII.A.2.d. - Conversions) the FCC stated the following:

> 579. We eliminate the commingling restriction that the Commission adopted as part of the temporary constraints in the *Supplemental Order Clarification* and applied to stand-alone loops and EELs. We therefore modify our rules to affirmatively permit requesting carriers to commingle UNEs and combinations of UNEs with services (e.g. switched and special access services offered pursuant to tariff), and to require incumbent LECs to perform the necessary functions to effectuate such commingling upon request. By

[29] We note that with regard to the D.C. Circuit Order the eligibility criteria for EELs, a combination of unbundled network elements, has been remanded to the FCC for further clarification but not vacated. In any event, the issue presented by DeltaCom – the conversion of special access circuits to a stand alone UNE loop terminating to a collocation site has remained undisturbed by the D.C. Circuit order.

commingling, we mean the connecting, attaching, or otherwise linking of a UNE, or a UNE combination, to one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to any method other than unbundling under section 251(c)(3) of the Act, or the combining of a UNE or UNE combination with one or more such wholesale services. Thus, an incumbent LEC shall permit a requesting telecommunications carrier to commingle a UNE or a UNE combination with one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to a method other than unbundling under section 251(c)(3) of the Act. In addition, upon request, an incumbent LEC shall perform the functions necessary to commingle a UNE or a UNE combination with one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to a method other than unbundling under section 251(c)(3) of the Act. As a result, competitive LECs may connect, combine, or otherwise attach UNEs and combinations of UNEs to wholesale services (e.g., switched and special access services offered pursuant to tariff), and incumbent LECs shall not deny access to UNEs and combinations of UNEs on the grounds that such facilities or services are somehow connected, combined, or otherwise attached to wholesale services.

585. We decline the suggestions of several parties to adopt rules establishing specific procedures and processes that incumbent LECs and competitive LECs must follow to convert wholesale services (*e.g.*, special access services offered pursuant to interstate tariff) to UNEs or UNE combinations, and the reverse, *i.e.*, converting UNEs or UNE combinations to wholesale services. Because both the incumbent LEC and requesting carriers have an incentive to ensure correct payment for services rendered, and because both parties are bound by duties to negotiate in good faith, we conclude that these carriers can establish any necessary procedures to perform conversions with minimal guidance on our part. [Footnotes omitted.]

586. We conclude that carriers may both convert UNEs and UNE combinations to wholesale services and convert wholesale services to UNEs and UNE combinations, so long as the competitive LEC meets the eligibility criteria that may be applicable. To the extent a competitive LEC fails to meet the eligibility criteria for serving a particular customer, the serving incumbent LEC may convert the UNE or UNE combination to the equivalent wholesale service in accordance with the procedures established between the parties. Likewise, to the extent a competitive LEC meets the eligibility requirements and a particular network element is available as a UNE pursuant to our impairment analysis, it may convert the wholesale service used to serve a customer to UNEs or UNE combinations in accordance with the relevant procedures. Converting between wholesale services and UNEs or UNE combinations should be a seamless process that does not affect the customer's perception of service quality.[1809] We recognize that conversions may increase the risk of service disruptions to competitive LEC customers because they often require a competitive LEC to groom interexchange traffic off circuits and equipment that are already in use in order to comply with the eligibility criteria. Thus, requesting carriers should establish and abide by any necessary operational procedures to ensure customer service quality is not affected by conversions. [Footnotes omitted, except the Commission notes that Footnote 1809 stated that "We note that no party seriously contends that it is technically infeasible to convert UNEs and UNE combinations to wholesale services and vice versa".]

588. We conclude that conversions should be performed in an expeditious manner in order to minimize the risk of incorrect payments. We expect carriers to establish any necessary timeframes to perform conversions in their interconnection agreements or other contracts. We decline to adopt ALTS's suggestion to require the completion of all necessary billing changes within ten days of a request to perform a conversion because such timeframes are better established through negotiations between incumbent LECs and requesting carriers. We recognize, however, that converting between

> wholesale services and UNEs (or UNE combinations) is largely a billing function. We therefore expect carriers to establish appropriate mechanisms to remit the correct payment after the conversion request, such as providing that any pricing changes start the next billing cycle following the conversion request. [Footnotes omitted.]

It seems reasonable for BellSouth to allow DeltaCom to convert special access loops that go to DeltaCom's collocation sites to UNE loops, as this now appears to be clearly permissible under the FCC's most recent findings in its *TRO*.

As for the rate to be charged for the conversions, DeltaCom stated that BellSouth should perform these conversions without physical disconnection and reconnection. Furthermore, the FCC has concluded that CLECs may convert existing access service arrangements to stand-alone UNEs or EELs and vice versa, and has affirmed that these conversions should be seamless and not affect end user perceptions of service quality. DeltaCom pointed out that BellSouth admitted that conversions do not require breaking apart facilities, and that the same circuit is in place and carrying traffic before and after the conversion. Additionally DeltaCom stated that it is technically feasible to convert special access loops to UNEs and will cause only administrative costs because the facilities to provide service pursuant to special access offerings and UNE offerings do not change. DeltaCom further stated that BellSouth has a charge for the conversion of special access to EELs, and the conversion cost to stand-alone UNEs should be no greater than that rate. DeltaCom maintained that the only real change to occur during the conversion process is a change in the billing rate. BellSouth stated that the issue of conversions is

addressed in the *TRO*, but the ultimate issue of whether a conversion is allowed depends upon further state proceedings identifying which elements will remain UNEs and whether CLECs meet certain eligibility requirements. Furthermore as stated by BellSouth, the FCC declined to set forth in the *TRO* a definitive process leaving the conversion process to be worked out between the CLECs and ILECs. If BellSouth determines that a conversion charge is appropriate or necessary, that charge must reflect TELRIC-based pricing principles and be submitted for approval prior to imposition. Conversions should be coordinated sufficiently to prevent or minimize disruption of service to DeltaCom end users. Further, any charge BellSouth proposes to perform this conversion should be subject to Commission approval.

Generally the facilities to provide service pursuant to special access offerings and UNE offerings do not change. Furthermore, the only real change to occur during the conversion process is a change in the billing rate, which at most would result in a possible administrative charge for the conversion process. We conclude that BellSouth should perform the conversion of special access loops to UNE loops and UNE loops to special access loops without disconnection and reconnection of the circuit. Conversions should be coordinated sufficiently to prevent or minimize disruption of service to DeltaCom end users. Any charge BellSouth proposes to perform this conversion should be subject to Commission approval.

Conclusion to Issues 37 and 57

The Panel concludes that BellSouth should allow DeltaCom to convert special access loops that go to DeltaCom's collocation site to UNE loops. Accordingly, the Panel recommends that DeltaCom and BellSouth be required to include compliant language in the Agreement. The Panel concludes that BellSouth should perform conversion of special access loops to UNE loops and UNE loops to special service access loops without disconnection and reconnection of the circuit. Conversions should be coordinated sufficiently to prevent or minimize disruption of service to DeltaCom end users. Further, BellSouth should be permitted to charge an administrative fee for these conversions, but such fee must comply with TELRIC principles and is subject to Commission approval.

ISSUE 44: ESTABLISHMENT OF TRUNK GROUPS FOR OPERATOR SERVICES

Should the interconnection agreement set forth the rates, terms and conditions for the establishment of trunk groups for operator services, emergency services, and intercept?

ISSUE 46: BLV/BLVI

Does BellSouth have to provide BLV/BLVI to DeltaCom? If so, what should be the rates, terms and conditions?

Position of DeltaCom

This issue relates to whether an operator can check a line that is repeatedly busy to determine whether there is conversation on the line (BLV) and can even interrupt the call in an emergency (BLVI). (T-527-528). BellSouth will perform this service for its own

customers, but *only* if they are calling customers on the BellSouth network and *not* the DeltaCom network. (T-528). BellSouth admits it is technically feasible to perform these services in these instances. (T-1637). BellSouth has further agreed that the appropriate facilities (trunks) are currently in place and that DeltaCom's request is not legally prohibited. (T-1639). BellSouth's decision to limit these services to BellSouth customers calling other BellSouth customers is apparently a business decision.[30]

Position of BellSouth

BellSouth argues that DeltaCom's request in this case is insincere because DeltaCom has not made its request to apply generally to the industry. BellSouth Brief, pp. 58-59. BellSouth argues that because there are other carriers with operator platforms, BellSouth should not be required to use the existing facilities (paid for by DeltaCom) to provide BLV/BLVI to BellSouth consumers calling DeltaCom customers. BellSouth further argues that BLV/BLVI are tariffed services, not UNEs, and are, therefore, not appropriate issues of a §251 arbitration. BellSouth suggests that can obtain BLV and BLVI pursuant to the rates, terms and conditions in BellSouth's applicable tariff.

Discussion of Issues 44 and 46

BLV/BLVI services increase consumer safety. BLV allows an operator to check a line that is repeatedly busy to determine whether there is conversation on the line; BLVI

[30] See testimony of BellSouth's witness, Ruscilli. (T-1645-1646). In its Brief, BellSouth calls its decision to discriminate against customers on the DeltaCom network (and its own customers who call them) an "economic choice." BellSouth Telecommunications, Inc.'s Post-Hearing Brief ("BellSouth Brief"), p. 58.

allows the operator to interrupt the call in an emergency. Currently, if a BellSouth customer is trying to reach a DeltaCom customer and the line is perpetually busy, the only option is for the that BellSouth customer to dial 911.[31] DeltaCom asserted that BellSouth's policy also negatively impacts other CLEC customers and DeltaCom UNE-P customers on BellSouth's network who cannot have BellSouth operators perform BLV/BLVI when calling DeltaCom facilities-based customers.

The central point of contention in this issue is where BellSouth customers are unable to request BLV/BLVI on DeltaCom customers' lines, because BellSouth operators will not communicate with DeltaCom operators in order to request these services. There is no technical reason that the Parties cannot provide between each other BLV and BLVI. There are currently two-way interconnection trunks in place between the Parties paid for by DeltaCom at tariffed access rates. Trunks between the BellSouth and DeltaCom operator centers have been in place for the last five years and the interconnection agreements between the parties have described the associated rates, terms and conditions. BellSouth seeks to remove this language from the interconnection agreement and require DeltaCom to order these services from BellSouth's access tariff, which does not address local traffic.

BellSouth witness Ruscilli suggested that BellSouth had made a business decision not to offer BellSouth customers the option of requesting BLV/BLVI services on

[31] DeltaCom witness Brownworth stated that a BellSouth customer who contacts a BellSouth operator and requests BLVI on a DeltaCom customer's line will be advised to call 911.

DeltaCom customers' lines. We note that, Section A3.15.1 of BellSouth's GSST states, in part: "The customer may request these services for a charge, where facilities are available. . . ."

Conclusion to Issues 44 and 46

The Panel concludes that BellSouth should provide a means by which its customers can obtain BLV/BLVI on lines assigned to DeltaCom. Therefore, the Panel recommends that the BellSouth and DeltaCom should be required to develop mutually acceptable language for their interconnection agreement that provides for customers of each company to obtain BLV/BLVI on lines assigned to subscribers of the other company at rates which are just and reasonable.

ISSUE 47: REVERSE COLLOCATION

Should BellSouth be required to compensate DeltaCom when BellSouth collocates in DeltaCom's collocation space? If so, should the same rates, terms and conditions apply to BellSouth that BellSouth applies to DeltaCom?

Position of DeltaCom

DeltaCom's position is that the same rates, terms and conditions that BellSouth applies to DeltaCom in this situation should also be applied to BellSouth when it collocates in DeltaCom's space.

DeltaCom asserts several reasons that BellSouth is incorrect in its argument that this issue is not appropriate for a Section 251 arbitration. BellSouth argues that only ILECs have a duty to permit collocation of other carriers' equipment in its locations, citing Section 251(c)(6) of the Act and emphasizing that the duty to provide physical

collocation is "at the premises of the local exchange carrier." 47 U.S.C. § 251(c)(6). DeltaCom points out that, "local exchange carrier" is defined in the Act as "any person that is engaged in the provision of telephone exchange service or exchange access" and thus is not limited to incumbents. 47 U.S.C. § 153(26). DeltaCom argues that BellSouth also ignores the duty under Section 251(a)(1) of the Act of all telecommunications carriers "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers."

Finally, the issue of whether BellSouth must pay when it uses DeltaCom's space to benefit DeltaCom's competitors falls within the definition of "any unresolved issue" under the Act and is therefore appropriate for resolution in this case.

Position of BellSouth

BellSouth first relies on a legal argument that this issue is not appropriate for a Section 251 arbitration because the Act discusses collocation in Section 251, addressing the obligations of incumbents. BellSouth thus concludes that because "reverse collocation" is not explicitly discussed in Sections 251 and 252, the issue in this case cannot be resolved by the Commission.

BellSouth further argues that it does not collocate in any DeltaCom premises, as the term "collocation" is defined by the Act, therefore, BellSouth does not need a collocation agreement and should not be forced to enter into a collocation agreement with

ITC. BellSouth claims it has never collocated its equipment in DeltaCom's central offices for the purpose of collocation, nor does BellSouth have such an intention.

Discussion of Issue 47

Aside from the legal issue, BellSouth's argument appears to be that because it installed certain equipment in DeltaCom Points of Presence ("POPs") for the mutual benefit of the parties, DeltaCom is precluded from arguing that it should be compensated when BellSouth turns around and uses the same equipment to the benefit of itself and DeltaCom's competitors. BellSouth Brief, pp. 60-62. BellSouth admits that it has placed equipment in DeltaCom collocation space that can be used to provide services to DeltaCom's competitors:

> Q. Does BellSouth locate equipment in ITC^DeltaCom's space that BellSouth uses to provide services to competitors of ITC^DeltaCom?
>
> A. Yes. And, I'm sorry, I thought I answered yes at the beginning, and if I didn't, I apologize. The answer is yes.
>
> Q. Thank you. And BellSouth gets paid by competitors of ITC^DeltaCom for those services, correct?
>
> A. Yes, it does

(T-1679-1680). BellSouth admits that it is using DeltaCom's space for purposes other than intended, but BellSouth refuses to compensate DeltaCom in those situations.

BellSouth admits that it is paid by competitors of DeltaCom for services BellSouth provides to such competitors through use of the DeltaCom space. When DeltaCom

places equipment in BellSouth's space, BellSouth charges for the space, space preparation, power requirements, cross-connect charges (where applicable), and rent on the use of space and power for DeltaCom equipment. (T-1676). The rates for collocation assessed by BellSouth were set by this Commission; and indeed, BellSouth argued strongly that these rates were too low. (T-1677). However, in current locations where BellSouth uses DeltaCom's space, it expects to receive this space and associated services for no charge – as it admits, a "free ride." (T-1687).

We note that whether DeltaCom has a duty to permit collocation of BellSouth equipment in its space is not the issue. The issue is reciprocity and whether BellSouth must compensate DeltaCom when it uses DeltaCom's space to serve DeltaCom's competitors. DeltaCom stated that the appropriate collocation rate is the Commission ordered collocation rate, which BellSouth agrees is appropriate and reasonable. BellSouth's defense appears to be that this issue is not appropriate for Section 252 arbitration because of its legal argument about the duty to collocate. DeltaCom concluded that the Commission should order BellSouth to pay to DeltaCom the Commission ordered rate for collocation whenever BellSouth utilizes DeltaCom space for activities other than those requested by DeltaCom.

The Parties have identified three reasons why BellSouth would collocate its equipment in DeltaCom's space: (1) to provide DeltaCom with special and switched access service; (2) to provide DeltaCom's competitors with special access services; or,

(3) to provide local interconnection trunks. It does not appear that either party disputes that the tariffs governing the provision of special and switched access services require DeltaCom to provide necessary space to BellSouth. Furthermore, it would be contravention to order payment for collocation of equipment necessary to provide DeltaCom with special and switched access services.

It is further noted that, it does not appear that either party disputes that the tariffs governing the provision of special and switched access services require DeltaCom to provide necessary space to BellSouth.

Conclusion to Issue 47

The Panel recommends that BellSouth be required to compensate DeltaCom for collocation of newly placed BellSouth equipment in DeltaCom space when the equipment is used for local interconnection or the provision of switched or special access to carriers other than DeltaCom. BellSouth shall not be required to compensate DeltaCom for collocation of BellSouth equipment currently in DeltaCom space. The Panel recommends that BellSouth be required to pay the same rates currently assessed to DeltaCom. Other terms and conditions applicable to DeltaCom should also apply to BellSouth.

ISSUE 56: CANCELLATION CHARGES

a) May BellSouth charge a cancellation charge which has not been approved by the Commission?

b) Are these cancellation costs already captured in the existing UNE approved rates?

Position of DeltaCom

DeltaCom argues that BellSouth should not be permitted to impose or include in the interconnection agreement a "cancellation charge." These charges, according to DeltaCom, are not derived from factors supported by record evidence. DeltaCom asserts that that BellSouth has made no cost study to support the factors that set such a rate, and that BellSouth cannot provide data to back up its proposal. (T-881, 1738).[32] Rather, BellSouth seeks to incorporate factors from its interstate access tariff or private line tariff. (T-881).

While BellSouth argues that its proposed rates are unrelated to UNEs, over which the Commission has jurisdiction, DeltaCom asserts that the proposed rates relate to charges associated with ordering network elements. DeltaCom asserts that allowing these cancellation charges would set a precedent that would authorize BellSouth to "where if there's not a rate that BellSouth wants to charge that's been approved by the Alabama Commission, they'll just reach out and find one somewhere else and argue that it ought to be incorporated in an interconnection agreement without state review . . . ." (T-887-888).

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[32] DeltaCom asserts that an extensive cost case was conducted in Docket No. 27821, wherein BellSouth had the opportunity to provide support for the cancellation charge it seeks to impose.

Thus, it will be virtually impossible for the Commission, and competitive carriers like DeltaCom, to know which of the thousands of rates filed at the FCC it needs to investigate and/or challenge as not cost-based. (T-897-898).

BellSouth claims it is using the nonrecurring ordering charge approved by this Commission and applying certain factors to it to determine the appropriate cancellation charge.[33] However, DeltaCom points out that the factors and percentages used by BellSouth come from the FCC tariff and are based on a 1990 access filing with that Commission. (T-1714). According to DeltaCom, this means either that the FCC accepted the filing without review or, even if the FCC reviewed the 1990 filing, it "approved" it based on an entirely different standard than the Commission uses with regard to UNE rates. (T-886). Additionally, DeltaCom argues, the reference chosen by BellSouth from that 1990 filing relates to a service that has very little to do with the work activities at issue in this docket.

Specifically, Section 5.4(B)(2) of BellSouth's FCC Access Tariff provides that if the customer cancels an Access Order on or after the Design Layout Report Date, a cancellation charge is determined using the critical dates in subsection 4(b). There are 12 critical dates and the percentages for each critical date are contained in Section 5.4(B)(4)(e). As explained by DeltaCom witness Wood, BellSouth is taking these factors

[33] BellSouth argues its proposed rates are "Commission-approved," but of course it means *FCC*-approved and is not referring to this Commission.

to generate a cancellation charge for a designed service or circuit and the factors simply do not apply to a UNE. (T-885-886).

DeltaCom does not believe that the cancellation charges proposed by BellSouth are in any way compliant with the TELRIC methodology as required by Section 251[34] and that BellSouth is asking this Commission to approve a set of factors that will be used to generate a charge for UNE services that has not been analyzed by the Commission.

Position of BellSouth

BellSouth argues that it is entitled to recover its costs for the provision of UNEs. BellSouth asserts that the rates it charges when a CLEC cancels an LSR are based on Commission-approved non-recurring installation rates for the specific UNE. Cancellation charges are a prorated portion of the non-recurring installation rate, and the proration is based on the point within the provisioning process that the CLEC cancels the LSR. These costs are not already recovered in the existing UNE approved rates.

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[34] The NCUC Staff has recently agreed with ITC^DeltaCom in the parties' North Carolina arbitration, noting that BellSouth has "failed to make any showing that its cancellation charges are TELRIC-based as required for Section 251 pricing of unbundled network elements." NCUC Staff Recommendation, p. 27. The NCUC Staff thus recommended that "BellSouth may not assess a cancellation charge which has not been approved by this Commission." Id. The NCUC Order concludes that BellSouth cannot charge a rate that has not been approved by the NCUC and if the parties cannot agree upon a rate then BellSouth must file a TELRIC based cancellation rate by April 1, 2004. The Georgia PSC Staff recently reached a similar conclusion, recommending against the imposition of a cancellation charge not previously approved.

Discussion of Issue 56

BellSouth proposed the following language in Section 6.0, Attachment 2 of the interconnection agreement:

> If ITC^DeltaCom cancels a request for network elements or resold services, any costs incurred by BellSouth in conjunction with the provisioning of that request will be recovered in accordance with BellSouth's Private Line Tariff or BellSouth's FCC No. 1 Tariff..

According to BellSouth witness Ruscilli, the vehicle CLECs use when placing orders for UNEs from BellSouth is the LSR. The rates applicable when a CLEC cancels an LSR are based on Commission-approved rates, according to Ruscilli. In contrast, DeltaCom witness Wood testified that half of the cancellation charge is the existing nonrecurring charge, which has already been approved by this Commission. The other half of the formula for these various rates is a percentage and a time, neither of which has been approved by this Commission.

According to BellSouth witness Ruscilli, the percentage factor is extracted from either its Intrastate Private Line Tariff or FCC No. 1 Tariff. Neither of these tariffs contains rates for local service: the FCC No. 1 Tariff specifies rates for interstate service, which is outside of this Commission's regulatory authority; and the Private Line Tariff contains rates for long distance service. BellSouth has neither offered nor presented any evidence to substantiate its use of percentage factors extracted from the Private Line Tariff or FCC No. 1 Tariff.

Section 251(c)(3) of the Act provides that the ILECs have a duty to provide nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of Sections 251 and 252. Network element charges, in accordance with Section 252, should be based on the cost of providing the interconnection or network element. BellSouth has not shown that its cancellation charges are TELRIC-based as required for Section 251 pricing of unbundled network elements. As a result, the Commission has no record on which to base a decision as to the appropriateness of the cancellation charge. Therefore, BellSouth may not assess the cancellation charge not approved by this Commission.

Witness Ruscilli also testified that BellSouth does not recover the costs of cancellation in the existing UNE approved rates.

Conclusion to Issue 56

The Panel concludes that these cancellation charges are not approved UNE rates. The Panel recommends that BellSouth be precluded from charging a cancellation charge not approved by the Commission. However, the Panel also recommends that BellSouth be allowed to file evidence on which to base a TELRIC-based cancellation rate for Commission review and approval.

ISSUE 59: PAYMENT DUE DATE

Should the payment due date begin when BellSouth issues the bill or when DeltaCom receives the bill? How many days should DeltaCom have to pay the bill?

Position of DeltaCom

DeltaCom seeks a payment due date of thirty days from receipt of a bill. DeltaCom receives approximately 1,700 invoices from BellSouth every month, 94% to 97% of which are transmitted electronically. (T-259, 262-265, 1836). Through this electronic billing, BellSouth is aware of when DeltaCom receives its bills. BellSouth provides a 30-day payment period, but it runs from the time the bill is generated within BellSouth – the "bill date." Both parties acknowledged, however, that even with electronically transmitted invoices, the actual date the bill is rendered to DeltaCom is a different date than the "bill date," sometimes not until several days later. (T-1836).

BellSouth argues that DeltaCom's proposal is "unnecessary" because "DeltaCom receives over 94% of its bills from BellSouth electronically." BellSouth Brief, p. 69. BellSouth further incorrectly states that electronic billing "obviously results in DeltaCom having even more time between the date they receive the bill and the payment due date." Id. It is precisely *because* most bills are provided electronically that a 30-day payment period from receipt is appropriate. The obvious pretense of BellSouth's argument is that DeltaCom receives an electronic bill quickly and has a full 30 days to pay it – thus the language sought by DeltaCom is "unnecessary." As admitted by both parties at the hearing, however, this is patently false because the actual date the bill is transmitted is

not the same as the "bill date," the date the bill is generated and the date on which the payment clock begins. Due to the prevalence of electronic billing, it is now quite easy to determine a date that is 30 days from the receipt of the invoice.

In support of their argument, DeltaCom asserts that reviewing BellSouth's bills consumes significant time and resources. BellSouth admitted that the 1,700 invoices sent to DeltaCom every month are extremely voluminous. (T-1837). Further, DeltaCom has approximately 4,000 current billing disputes with BellSouth, perhaps evidencing a high number of errors. (T-259). BellSouth's position that DeltaCom should meet the "due date," which is the next "bill date" (again, the time the bill is generated within BellSouth), regardless of when DeltaCom actually receives the bill, is unfair and unworkable on its face. At a minimum, a 30-day period from receipt is appropriate with regard to electronic invoicing because the due date will be easily and readily known by both parties.

Position of BellSouth

BellSouth maintains that the payment should be due by the next bill date. BellSouth explained that it invoices DeltaCom every 30 days, and based on that bill date, DeltaCom knows exactly what date the payment is due for each of those invoices. BellSouth stated in its Post-Hearing Brief that its billing systems are programmed around that bill date and BellSouth's anticipated cash flows are based on receiving payments on particular days of the month. BellSouth argues that DeltaCom now seeks to change this

system and does not want to pay for any costs associated with making this type of massive regional billing system modification. Aside from involving a dramatic change to complex billing systems, BellSouth asserts that DeltaCom's request is unnecessary. BellSouth notes that through DeltaCom's own testimony, DeltaCom admitted to having "years of timely payment to BellSouth for wholesale services." Thus, BellSouth argues, if BellSouth's bill payment terms were onerous, as DeltaCom implies, it is doubtful that DeltaCom would have the good payment history that it touts.

In addition, BellSouth contends that its long-standing billing practice in no way limits DeltaCom's ability to review and dispute invoices received from BellSouth, as DeltaCom can dispute invoices long after the payment due date and, in fact, DeltaCom has filed such disputes. BellSouth states that, to the extent DeltaCom has questions about its bills, BellSouth cooperates with DeltaCom to provide responses in a prompt manner and resolve any issue. Furthermore, BellSouth points out that DeltaCom acknowledges that it receives 95% of its billings from BellSouth electronically, which results in DeltaCom having even more time between the date it receives the bill and the payment due date.

Further, BellSouth notes that DeltaCom acknowledges that the Commission and the FCC had both considered all of BellSouth's billing practices during the course of BellSouth's Section 271 long-distance application and concluded that BellSouth's billing practices (including this one) were nondiscriminatory. BellSouth also observes that

DeltaCom acknowledges that the Commission has performance metrics, and associated penalties, in place that measure whether BellSouth is providing timely and accurate bills to DeltaCom. Consequently, BellSouth contends that it is reasonable for payment to be due before the next bill date.

Discussion of Issue 59

It is important to encourage the Parties to render accurate and timely bills and also to allow the Parties adequate time to review the bills for any inaccuracies. Therefore, the Panel recommends that the bill shall be due 30 days after the date the bill is transmitted by BellSouth. The record reflects that DeltaCom currently receives over 90 percent of its bills electronically. DeltaCom then has the opportunity to review the vast majority of its bills for errors from the same date the bill is sent out. If, on the other hand, the due date was calculated based on the billing date, as proposed by BellSouth, then BellSouth has less motivation to post the bills to DeltaCom as soon as possible.

Conclusion to Issue 59

The Panel concludes that the payment due date should be 30 days from the date of receipt of the bill. Accordingly, the Panel recommends that the Commission require DeltaCom and BellSouth to properly amend the proposed language in the agreement to reflect this conclusion.

ISSUE 60: DEPOSITS

a) Should the deposit language be reciprocal?

b) Must a party return a deposit after generating a good payment history?

Position of DeltaCom

DeltaCom makes the following requests with regard to deposits: (1) interconnection agreement language that recognizes DeltaCom's long, undisputed record of good payment and that no deposit be charged to DeltaCom at this time; (2) reciprocity – both parties operate under the same deposit language with regard to one another; and (3) consistency - deposits should be returned if they are collected from a customer who subsequently establishes a good payment history.

DeltaCom has proposed very thorough deposit language in the Prefiled Direct Testimony of Mr. Watts. (T-125-128; Exhibit A to Post-Hearing Brief). BellSouth argues this language is "too lax" (BellSouth Brief, p. 70). DeltaCom's language merely recognizes the importance of a good payment history such as that proven by DeltaCom. DeltaCom argues BellSouth's proposed language, by contrast, is so vague as to be standardless, and could result in BellSouth being able to justify a deposit under any circumstances. DeltaCom asserts that good payment history is the key to determining whether deposits are appropriate in existing business relationships.

BellSouth concedes that DeltaCom has never failed to pay an undisputed bill in the past 20 years. (T-1778). Rather, BellSouth is concerned about other CLECs adopting

DeltaCom's deposit language and no CLEC ever paying a deposit. DeltaCom suggests that BellSouth's concern be allayed by the inclusion of the following language:

> Notwithstanding the above criteria, no deposit will be required from a company, or a successor of a company which has a continuous payment record, with no defaulted payment of undisputed charges, for a period of at least 120 months, unless such company demonstrates a poor payment history for the 12 consecutive months prior to the deposit request. The parties acknowledge and agree that, as of the date of execution of this agreement, ITCD does not have a poor payment history.

DeltaCom two additional requests are opposed by BellSouth. DeltaCom wishes the deposit language to be reciprocal, given that BellSouth pays DeltaCom millions of dollars per year, as BellSouth should be willing to live by the same rules it wants to apply to CLECs. DeltaCom also desires that any deposit, if appropriate, be returned after six months of good payment.[35] DeltaCom asserts that BellSouth opposes these requests so that BellSouth can charge DeltaCom an exorbitant deposit and hold it in perpetuity as a wedge against retail competition. DeltaCom asserts that adopting BellSouth's position will lead to less capital for DeltaCom to invest for the benefit of competition and the retail consumers of Alabama.

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[35] It is noteworthy that the current deposit language in the existing Commission approved interconnection agreement is reciprocal. See Attachment 7 Section 1.11 of the ITC^DeltaCom/BellSouth interconnection agreement currently on file with the Commission.

Position of BellSouth

BellSouth argues that the deposit language should not be reciprocal because BellSouth is not similarly situated as a CLP provider and should not be subject to the same creditworthiness and deposit requirements. When BellSouth buys services from a CLEC's tariff, the terms and conditions of such tariff will govern whether a deposit is required of BellSouth. Thus, according to BellSouth, the interconnection agreement should not include deposit requirements that would be placed upon BellSouth.

BellSouth also argues that it should not be required to return a deposit merely because a CLEC has generated a good payment history since payment history alone is not a measure of credit risk.

Discussion of Issue 60

Regarding language in the interconnection agreement on the payment of deposits, DeltaCom witness Watts testified that DeltaCom should not be required to provide a deposit to BellSouth since DeltaCom has maintained a good payment history with BellSouth. Witness Watts stated that DeltaCom has neither missed an undisputed payment to BellSouth in 20 years nor defaulted on payment of an undisputed bill. Despite filing for and emerging from bankruptcy, DeltaCom has managed to pay its bills to BellSouth in a timely manner. Further, witness Watts argued that BellSouth's insistence that DeltaCom should provide greater payment assurance is unreasonable in light of the FCC's policy statement that narrower protections such as accelerated and

advanced billing would strike a better balance between the interests of incumbent LECs and their customers in accordance with statutory standards than imposing additional deposit requirements on customers.[36] However, witness Watts testified that DeltaCom does not believe that accelerated or advanced billing requirements should be imposed on it given its good payment history. DeltaCom noted that BellSouth pays DeltaCom for certain services and maintained that any language in the agreement regarding deposits should, consistent with FCC policy, be reciprocal and non-discriminatory.

BellSouth witness Ruscilli testified that payment history alone is not an adequate measure of one's creditworthiness and that BellSouth should be entitled to perform a full credit analysis that goes beyond mere payment history. Despite having a good payment history, several BellSouth customers, including DeltaCom, remained current on their payments up through filing for bankruptcy. In response to DeltaCom's testimony that BellSouth's deposit policy is administered in a discriminatory fashion, witness Ruscilli testified that BellSouth treats its retail and wholesale customers the same with respect to credit scoring when making deposit requirement and refund decisions. Regarding reciprocity, witness Ruscilli testified that deposit requirements should not be reciprocal since BellSouth is not similarly situated with CLEC providers such as DeltaCom. Unlike DeltaCom, BellSouth, under the mandate of the 1996 Act, cannot decline to do business with a CLEC customer it finds to be credit-risky. Further, when BellSouth purchases

[36] *In the Matter of Verizon Petition for Emergency Declaratory and Other Relief*, WC Docket No. 02-202, December 23, 2002, at ¶30.

from a CLEC's tariff, the terms of the tariff contain provisions applicable to whether BellSouth is required to pay a deposit.

The Panel notes that BellSouth's intrastate access tariff provides that existing customers are only required to post a deposit where there is a poor payment history:

> **E2.4.1 Payment of Rates, Charges and Deposits**
> **A.** The Company will, in order to safeguard its interests, **only require a customer which has a proven history of late payments** to the Company or does not have established credit to make a deposit prior to or at any time after the provision of a service to the customer to be held by the Company as a guarantee of the payment of rates and charges. **No such deposit will be required of a customer which is a successor of a company which has established credit and has no history of late payments to the Company.** Such deposit may not exceed the actual or estimated rates and charges for the service for a two month period. The fact that a deposit has been made in no way relieves the customer from complying with the Company's regulations as to the prompt payment of bills. At such time as the provision of the service to the customer is terminated, the amount of the deposit will be credited to the customer's account and any credit balance, which may remain, will be refunded.

Conclusion to Issue 60

The Panel finds that the deposit language should be reciprocal and in following with the FCC's policy on deposits. However, we decline to require the parties to return a deposit based upon generation of good payment history. We recommend that the Commission require the parties to provide reciprocal deposit language in the interconnection agreement.

ISSUE 62: LIMITATION ON BACK-BILLING

Should there be a limit on the parties' ability to back-bill for undercharges? If so, what should be the time limit?

Position of DeltaCom

DeltaCom maintains back-billing for extended periods of time involves exposing companies to the problem of being unable to accurately establish cost structures for the pricing of retail services. Additionally, it becomes more difficult for the party receiving the late charges to verify their accuracy since some needed data may no longer be readily available. BellSouth previously entered into contracts with vendors where the back billing periods are limited to 90 days. (T-1748). DeltaCom complains that faulty billing processes resulted in DeltaCom receiving bills for services provided years ago. According to DeltaCom, limiting back billing to 90 days will provide incentives to prevent an inaccurate billing system and will ensure reasonable expectations, as well as flexibility, between parties as to the costs of doing business.

Position of BellSouth

BellSouth states the Panel should decline to impose any limitation on a party's ability to back-bill for services rendered under the Interconnection Agreement. BellSouth Brief, p. 75. The state statutes of limitation for contracts prohibit the Commission from establishing a back billing period in a telecommunications agreement between carriers that is less than the statutory period to bring a contract action. Further, BellSouth avers that the Commission previously decided the back-billing issue raised by DeltaCom by

promulgating Rule T-5. (No utility may back bill a retail customer in excess of thirty-six (36) months).

Discussion of Issue 62

The Commission exercises direct authority over the specialized areas of telecommunications and intercarrier relations. Further, the Commission is granted authority by Congress to determine the terms of interconnection agreements in the context of arbitrations. The Panel is convinced Rule T-5 applies to retail billing in the telecommunications industry. The arbitable issue here regards wholesale billing between telecommunications carriers, which may impact an accurate and timely billing to retail customers.

The issue is whether BellSouth can properly back-bill DeltaCom for services provided months or even years ago. The Commission is allowed by state law to provide a back-billing time limit in interconnection agreements.

DeltaCom witness Jerry Watts testified that DeltaCom's position is back billing should be limited to 90 days. The witness provided several reasons to support such position as follows: (1) 90 days provides ample time for the rendering of correct invoices and is being proposed as a reciprocal requirement; (2) back billing for extended periods of time exposes both companies to the problem of being unable to establish accurate cost structures for the pricing of retail services; (3) back billing based on revisions in policy and/or changes in the interpretation of rules or regulation make it difficult for the billed

party to challenge new or increased charges; and (4) data that is readily available during a 90-day period may no longer be available over extended back billing periods. Further, Jerry Watts maintained that although longer back-billing periods may be reasonable for retail services, the retail standard should not be used for wholesale services.

BellSouth's witness, John Ruscilli testified that due to the complexity of BellSouth's billing systems, 90 days is not sufficient time for retrieval of billing data and records. Further, 90 days is not sufficient time for system programming to substantiate and support the back billing of under-billed charges. Mr. Ruscilli testified that BellSouth currently has a back-billing limitation of 12 months in Florida, and existing vendor agreements with much shorter back-billing periods. [T. 1744; 1756]

Conclusion to Issue 62

The Panel concludes a three (3) month limitation on back billing is sufficient time. However, the Panel further concludes that either DeltaCom or BellSouth may properly petition the Commission to allow back billing up to 36 months for a particular charge, upon a showing of good cause. The Panel recommends that petition exceptions to the three (3) month limitation on back-billing should include changes arising out of governmental mandates, regulatory actions, true-ups, and/or other similar proceedings.

ISSUE 63: AUDITS

Should the Agreement include language for audits of the parties' billing for services under the interconnection agreement? If so, what should be the terms and conditions?

Position of DeltaCom

DeltaCom receives approximately 1,700 invoices from BellSouth every month (T-259). These are transmitted over 21 billing cycles with each invoice containing substantial amounts of data. According to DeltaCom, without the right to audit BellSouth, DeltaCom possesses no effective measure to ensure that billing is accurate. DeltaCom requests the right to audit unusually high charges from BellSouth. It is noted that BellSouth is the only entity with the raw data necessary to back up its billing in order that DeltaCom may perform such an audit. DeltaCom notes that it has negotiated in good faith to provide auditing rights to BellSouth with regard to several other issues in the interconnection agreement. (T-1792).

DeltaCom alleges that performance measures and penalties are not impacted here, since even if BellSouth met standards set by the Commission, that would not provide DeltaCom with the information needed to actually audit BellSouth's invoices. BellSouth admits it is "possible" for DeltaCom to find billing errors not reported in BellSouth's performance measure data. (T-1802-1803). DeltaCom maintains that it needs to use its own resources to audit bills for accuracy, not simply monitor industry-wide performance measure reports and hope that its' specific bills - even where they appear incorrect - are accurate.

DeltaCom states that, at a minimum, DeltaCom should be treated similarly to other carriers. The language DeltaCom seeks with regard to audits already exists in the Sprint/BellSouth interconnection agreement previously approved by this Commission.

Position of BellSouth

BellSouth insists that this Commission's performance measures and penalties regarding the accuracy of BellSouth's billing, makes DeltaCom's request as to audits simply unnecessary. BellSouth Brief, p. 77; (T-1780-1781). Performance measurements addressing the accuracy and timeliness of BellSouth's billing provide sufficient mechanisms for monitoring BellSouth's billing according to BellSouth. Inclusion of audit language for billing in the agreement is duplicative and an unnecessary use of resources. Further BellSouth asserts that adoptions of other previously approved interconnection agreements pursuant to 47 U.S.C. § 252(i) are limited to network elements, services, interconnection rates, terms, and conditions. 47 U.S.C. § 252(i) only requires an ILEC to make available "any interconnection, service, or network element" under the same terms and conditions as the original Interconnection Agreement.

In summary, BellSouth maintains that the audit issue involves a legal interpretation of Section 252(i), which addresses the ability of CLECs to adopt provisions of interconnection agreements between BellSouth and other CLECs.

Discussion of Issue 63

DeltaCom witness Jerry Watts testified DeltaCom's position is that the "pick and

choose" rule applies to all contract provisions and specifically to billing language. Mr. Watts asserted billing has long been considered a service as normal practice in the industry. Mr. Watts further testified that the FCC has consistently held that access to OSS functionalities (of which billing is one) is a critical element of providing nondiscriminatory access to UNEs under Section 251(c)(3) of the Telecommunications Act. Mr. Watts further noted that such has been a general requirement applicable to all ILECs under the Act. Additionally, Mr. Watts stated with respect to Regional Bell Operating Companies (RBOCs), (like BellSouth), the FCC has held that deploying the necessary OSS functions that allow competing carriers to order network elements, as well as combinations of network elements, and receive the associated billing information, is critical to provisioning those network elements. (Ameritech Michigan Section 271 Order at Paragraph 160).

CLECs must have the ability to perform company-specific audits of billing processes, procedures, and data. The witness maintained the fact that performance measurement plans include some measures of billing accuracy should not justify limiting DeltaCom's reciprocal rights to audit such critical aspect of the business relationship with BellSouth.

Mr. Watts stated that the inclusion of "services" in the language of Section 252 includes billing. The witness asserted that billing has long been considered a service throughout the telecommunications industry. DeltaCom noted it has requested from

BellSouth the same language that BellSouth provides to Sprint, regarding the right to audit BellSouth bills. BellSouth maintains that this language is effective only as long as the other carrier's agreement is in place. DeltaCom rejects such view of the "pick and choose" rule as unworkable. DeltaCom notes this will result in the BellSouth/DeltaCom interconnection agreement being silent as to audit rights, once the Sprint /BellSouth interconnection agreement expires. Moreover, according to DeltaCom, if the language is appropriate for inclusion in the Sprint agreement, the same is appropriate for the DeltaCom agreement - and for the life of the DeltaCom agreement. DeltaCom asserts that more important than a legal debate over the extent of BellSouth's "pick and choose" obligations is a substantive underlying need for DeltaCom to have audit rights with regard to BellSouth's bills. DeltaCom receives approximately 1,700 invoices from BellSouth every month, which are transmitted over 21 billing cycles. Each invoice contains substantial amounts of data. Without the right to audit BellSouth, DeltaCom has no effective way of ensuring that the billing is accurate.

Even if BellSouth meets the standards set by the Commission, such will not provide DeltaCom with the information needed to audit BellSouth's invoices. DeltaCom maintains that it wishes to use its own resources to audit bills for accuracy. DeltaCom agrees to allow BellSouth audit rights with regard to several other issues in the interconnection agreement, including auditing systems regarding Percent Interstate Usage (PIU), Percent Local Usage (PLU), Percent Local Facilities (PLF), and local percentage

usage for enhanced extended links (EELs). DeltaCom requests that the Panel recommend, for the full term of the agreement at issue in this case, that BellSouth be obligated to provide DeltaCom auditing rights identical to those provided by BellSouth to Sprint

BellSouth witness John Ruscilli testified that audits of BellSouth's billing for services under the interconnection agreement are not necessary Mr. Ruscilli stated that performance measurements addressing the accuracy and timeliness of BellSouth's billing provide sufficient mechanisms for monitoring BellSouth's billing. Mr. Ruscilli maintains that inclusion of audit language for billing in the agreement would be duplicative and an unnecessary use of resources. Witness Ruscilli noted that in response to DeltaCom's request to adopt Sprint's language on this issue, adoptions pursuant to Section 252(i) are limited to network elements, services, and interconnection rates, terms, and conditions and do not apply to other aspects of the interconnection agreement that are not required pursuant to Section 251. Witness Ruscilli concluded that Section 252(i) only requires an ILEC to make available any interconnection, service, or network element under the same terms and conditions as the original interconnection agreement.

BellSouth maintains this issue involves a legal interpretation of Section 252(i) of the Act. BellSouth noted that Section 252(i) states that a local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party, to any other requesting telecommunications carrier, upon the same terms and conditions as those provided in the

agreement.

BellSouth notes that specifically, DeltaCom seeks to adopt audit language from an existing Sprint/BellSouth interconnection agreement. BellSouth states audits are not an interconnection, service, or network element provided by BellSouth, and therefore, the Act does not allow DeltaCom to adopt such specific language from the Sprint/BellSouth interconnection agreement. BellSouth maintains that audits are not necessary for BellSouth to prepare and submit bills to DeltaCom. BellSouth asserts that DeltaCom fails to establish that the language it seeks to adopt is in any way an interconnection, service, or network element. Therefore, BellSouth proposed that the Panel should reject DeltaCom's attempt to improperly use Section 252(i). BellSouth argues that the Commission has previously established performance measurements to address the accuracy and timeliness of BellSouth's bills to DeltaCom and all CLECs.

The Panel believes that it is beneficial for the Parties to be able to audit billing services, regardless of the "pick and choose" rules. DeltaCom should be allowed to audit BellSouth's billing. The presence of performance measurements on billing does not preclude DeltaCom from auditing BellSouth's billing function. The Panel notes that Measure B-1 - Invoice Accuracy in BellSouth's Alabama performance measurement plan, verifies the accuracy of a sample of local bills from each bill period. Thus, it is appropriate for DeltaCom to have audit rights in this regard, since the performance measurements only verify a sample of bills.

Conclusion to Issue 63

The Panel concludes that it is appropriate to include language for audits of the Parties' billing for services under the interconnection agreement. Further, the Panel recommends that the ITC^DeltaCom/BellSouth agreement include language allowing for billing audits. That language can be taken from the existing Sprint/BellSouth interconnection agreement. The audit capability should be for the entire term of the ITC^DeltaCom/BellSouth agreement.

ISSUE 64: ACCESS DAILY USAGE FILE (ADUF)

What terms and conditions should apply to the provision of Access Daily Usage File ("ADUF") records?

Position of DeltaCom

BellSouth provides DeltaCom an ADUF record for the billing of access charges when DeltaCom purchases unbundled local switching (T-987-988). This record is necessary for DeltaCom to pass along the appropriate long distance charges to the end user. BellSouth currently includes local calls in the ADUF records provided to DeltaCom. DeltaCom argues that it should not be billed for ADUF records associated with local calls. These charges are not recovered from the end user according to DeltaCom.

Position of BellSouth

BellSouth rejects DeltaCom's request that only access charges be billed via ADUF records, referring to such request as a customized report. DeltaCom is asking BellSouth

to isolate and provide to DeltaCom only certain ADUF records. ADUF includes records for billing interstate and intrastate access charges. For various reasons, the ADUF records that BellSouth provides to DeltaCom include information on some local calls. The dispute is over whether BellSouth should separate and remove these local calls from the ADUF records that it provides to DeltaCom. DeltaCom argues that BellSouth's systems are "flawed." BellSouth states that the systems work the way they are supposed to work, but maintains that DeltaCom is asking BellSouth to generate a custom report for DeltaCom, excluding local calls and/or duplicative calls. BellSouth argues that if DeltaCom wants a customized report, DeltaCom should pay for it. Further, BellSouth argues that DeltaCom could rectify any problems by instructing its customers not to use interstate dial-around codes for local calls. Additionally, DeltaCom could simply block local calls that generate ADUF records.

Discussion of Issue 64

The Panel believes that BellSouth should not bill DeltaCom for ADUF records for non-access code local calls. The Panel believes that if non-access code local calls are included in the standard BellSouth ADUF report, BellSouth should take reasonable care not to bill DeltaCom for records related to those local calls. If BellSouth inadvertently bills DeltaCom for such records, then BellSouth should make prompt adjustments to: (1) cancel the improper charges; and/or (2) credit or reimburse DeltaCom for any related overpayment, once DeltaCom brings improper charges to BellSouth's attention.

Conclusion to Issue 64

The Panel recommends that the Commission order BellSouth not to bill DeltaCom for ADUF records for non-access code local calls.

ISSUE 66: TESTING OF END USER DATA

Should BellSouth provide testing of DeltaCom end-user data? If so, what are the rates, terms, and conditions for such testing?

Position of DeltaCom

DeltaCom argues that BellSouth should provide DeltaCom the ability to test its data to the same extent BellSouth's retail division tests its own data. BellSouth has agreed through the Change Control Process ("CCP") to enhance testing functionality by May 2004 so that CLECs can perform testing with "live" or actual customer information. (T - 1130). DeltaCom argues that currently only BellSouth enjoys this advantage. DeltaCom argues that even though BellSouth has "targeted" the May 2004 date, the Commission should mandate explicit interconnection agreement language requiring BellSouth to provide this functionality by no later than June 1, 2004.

Additionally, DeltaCom argues it should be allowed a test venue that will support the version of TAG or EDI in production and the version to which DeltaCom is migrating. This is needed to ensure that DeltaCom is not negatively impacted by the migration to a new Release of ENCORE or CAVE. BellSouth rejected a different portion of the testing enhancement requests made by CLECs. Change Request Number 1258 asked BellSouth to expand CAVE to support increased CLEC testing of ENCORE

release versions, i.e. Release 12.0 as well as Release 13.0. The issue here is when a new Release of ENCORE is put into production, a CLEC operating on the prior standard in effect loses its testing capabilities. DeltaCom is requesting that it be allowed to test in both environments - the new standard and the existing one - in order to ensure that the migration to the new system does not impact operations or consumers. DeltaCom insists that BellSouth can do this on its retail side. DeltaCom states that this enhancement is needed for DeltaCom and other CLECs to ensure parity with the testing capabilities enjoyed by BellSouth's retail division.

Position of BellSouth

This issue involves process and systems changes that affect all CLECs on a regional basis and should be addressed in the CCP. In addition, BellSouth provides CLECs with access to the two testing environments: the traditional testing environment (used where a CLEC is shifting from manual to an electronic environment, or upgrading its electronic interface to a new industry standard) and the CLEC Application Verification Environment ("CAVE"), which allows CLECs to perform optional, functional, and pre-release testing for EDI, TAG, and LENS. These test environments are governed under CCP

Discussion of Issue 66

The CCP allows all CLECs to have a voice in upgrades to the OSS and in the priority in which OSS changes will be made. The CCP is regional in nature, and changes

to it should not be decided upon in individual arbitrations. If parties have disputes arising from the CCP, then they should adhere to the escalation and dispute resolution process included in the CCP Document.

The CCP provides the opportunity for the CLECs to prioritize, by CLEC vote alone, the candidate change requests, and that vote, along with available capacity, helps to determine into which release a particular change request will be slotted.

Conclusion to Issue 66

The Panel concludes that this issue is being adequately managed using the Change Control Process. Thus the Panel recommends that this issue be handled in the Change Control Process.

ISSUE 67: AVAILABILITY OF OSS SYSTEMS

Should BellSouth be allowed to shut down OSS systems during normal working hours (8 a.m. to 5 p.m.) without notice or consent from DeltaCom?

Position of DeltaCom

DeltaCom stated that it relies on BellSouth's OSS in order to submit ordering and pre-ordering information for customers who contact DeltaCom regarding telecommunications services. The three OSS interfaces at issue are LENS, TAG, and EDI. DeltaCom uses these interfaces to submit orders and associated information. DeltaCom loses this capability when BellSouth shuts down *all three of them* at the same time. DeltaCom stated that it is not seeking a provision that requires all three interfaces to be working during normal business hours (Monday to Friday, 8 a.m. to 5 p.m.) –

simply that at least one of them be working. (T-987).

DeltaCom affirms that it does not seek a prohibition on taking down the systems in an emergency or even negative consequences for BellSouth in the event of inadvertent failures. According to DeltaCom, the real issue is when BellSouth plans in advance to upgrade its OSS or release updated software. DeltaCom asks in these non-emergency situations that BellSouth perform these upgrades outside of normal business hours, or work on some, but not all three interfaces at a single time. Otherwise, DeltaCom believes that BellSouth should have to obtain DeltaCom's consent prior to taking down all OSS interfaces during normal working business hours.

Position of BellSouth

Arbitration is not the appropriate forum for the resolution of this issue This issue involves process and systems changes that affect all CLECs on a regional basis and should be addressed in the CCP. In addition, BellSouth provides DeltaCom and all CLECs with OSS system availability times At certain times these systems are not available due to scheduled maintenance or upgrades. These are normally performed during off peak hours. CLECs are given notice as governed under CCP when OSS systems will not be available during normal availability hours.

Discussion of Issue 67

The stated arbitration issue is whether BellSouth must notify or obtain consent from DeltaCom prior to shutting down the OSS systems during normal business working hours. BellSouth asserts that it does provide notice to CLECs via the CCP. DeltaCom asserts that BellSouth should perform OSS upgrades and release updated software, in non-emergency situations, outside of normal business hours. Additionally, BellSouth should not shut down all three OSS interfaces at the same time. Otherwise, DeltaCom asserts that BellSouth should have to obtain DeltaCom's consent prior to taking down all OSS interfaces during normal working business hours.

We agree that, to the extent possible, OSS interfaces should be available to CLECs during normal business hours. Only in emergency situations should BellSouth shut down interfaces during normal business hours. In addition, BellSouth should have a method to notify CLECs when OSS interfaces will not be available during normal business hours. Posting this information on its web site is not adequate notification.

Conclusion to Issue 67

We find that BellSouth should provide DeltaCom notice of scheduled outages in advance and that to the extent technically feasible, BellSouth should maintain OSS systems such that orders can be processed. The Panel recommends that the parties place language in the agreement which reflects that OSS interfaces will be available during normal business hours and that only in emergency situations will all three OSS

interfaces be shut down at the same time. The language should also reflect that in situations where all OSS interfaces have to be shut down at the same time, BellSouth should notify DeltaCom prior to shutting down those systems.

DATED this the 27th day of April 2004.

MARK G. MONTIEL, Facilitator

JAMES E. WILSON, Panel Member

TERRY L. BUTTS, Panel Member

cc: Francis B. Semmes
Nanette Edwards
Robin G. Laurie
David I. Adelman
Charles B. Jones, III

DELTACOM/BELLSOUTH JOINT ISSUES MATRIX
APSC DOCKET NO. 28841

ISSUE NO.	ISSUE DESCRIPTION	ITC^DELTACOM POSITION	BELLSOUTH POSITION	ISSUE STATUS
1	**Term of the Agreement** (GTC – Section 2.1;2.3 – 2.6): a) Should the new interconnection agreement provide that the parties continue to operate under that Agreement or under BellSouth's Standard Interconnection Agreement pending the determination of the Commission's ruling in any future arbitrations? b) What should be the length of the term of the agreement resulting from this arbitration?	a) Yes. ITC^DeltaCom should be permitted to continue under an existing approved agreement pending any arbitration decision. Continuity is important. It is a greater hardship to ITC^DeltaCom to move to a completely new contract than for BellSouth to simply continue under the existing agreement. The current interconnection agreement provides that the parties will continue to operate under the existing agreement. b) Five years. Negotiations and arbitrations are costly. Requiring a shorter term contract will work a particular hardship on smaller companies such as ITC^DeltaCom. Three years is too short. The parties executed the last four agreements in early 2002 and turned around a month or two later to start new negotiations for a new agreement. Moreover, regulators should not be asked to expand valuable taxpayer resources or such short intervals.	a) Not indefinitely. The parties should operate under the provisions of the expired Agreement for no more than 12 months after the expiration date. Combined with the re-negotiation provisions, this gives the parties approximately 21 months to enter into a new Agreement, either through negotiation or arbitration. Subsequent to the 12-month period, the parties should default to BellSouth's Standard Interconnection Agreement. It is unreasonable to require the rates, terms and conditions of the expired Agreement to continue to apply as it stifles BellSouth's ability to implement new processes or forces BellSouth to maintain old processes to be performed manually. b) The term of the new Agreement should be no more than 3 years. This is consistent with the three year timeframe set by the FCC for review of its rules under Section 251.	Closed

APPENDIX A

ISSUE NO.	ISSUE DESCRIPTION	ITC^DELTACOM POSITION	BELLSOUTH POSITION	ISSUE STATUS
2	**Directory Listings** (GTC – Section 4; Attachment 6 – Section 2.2.2): a) Should BellSouth provide DeltaCom, for the term of this Agreement, the same directory listing language found in the BellSouth/AT&T Interconnection Agreement? b) Should BellSouth be required to provide an electronic feed of the directory listings of DeltaCom customers? c) Should DeltaCom have the right to review and edit its customers' directory listings? d) Should there be a credit or PMAP measure for accuracy of directory listings and, if so, what should be the credit or PMAP measure?	a) ITC^DeltaCom should have access to its end user customer listings in a reasonable time prior to publication in the BellSouth Directory. BellSouth sends the listings to BAPCO and ITC^DeltaCom should be able to verify that they have been accurately submitted. b) ITC^DeltaCom wants to be able to double-check listings for mistakes. CLECs' listings are commingled with the BellSouth listings, but distinguished by the OCN. These should be extracted prior to book print for review. An electronic comparison of what was submitted versus what is being printed is in the best interest of both parties. c) Yes. Since ITC^DeltaCom is blind to the actions between BellSouth and BAPCO, and bears the financial responsibility to its end user, ITC^DeltaCom must be able to validate the accuracy of the listings. d) BellSouth will only return the monies collected/billed for the white page listings. Since Advertising dollars in the Yellow Pages (BAPCO) are not covered, BellSouth should be required to meet a Performance Standard.	a) Pursuant to 47 USC § 2252(i), DeltaCom can adopt rates, terms and conditions for network elements, services, and interconnection from an interconnection agreement filed and approved pursuant to 47 USC § 252, under the same terms and conditions as the original Interconnection Agreement. DeltaCom has not requested of BellSouth to adopt any language for directory listings from an agreement filed and approved by the Alabama Commission. To the extent DeltaCom adopts rates, terms and conditions for directory listings from an agreement filed and approved by this Commission, such an adoption would be incorporated into DeltaCom's agreement for the original term of the adopted agreement (i.e., for the term of the other CLEC's agreement). The language included in BellSouth's proposal should replace the adopted language when it expires. b) BellSouth is required to provide access to its directory assistance database and charges fees to do so in both its Agreement and its tariff. BellSouth is not required to provide an electronic feed of directory listings for DeltaCom customers. c) DeltaCom has the right to review and edit its customer's directory listings through access to their customer service records. BellSouth Telecommunications does not have a database through which review and edits of directory listings may be made. d) If an error occurs in a Directory Listing, DeltaCom can request a credit for any monies billed that are associated with the charge for said listing pursuant to BellSouth's General Subscriber Service Tariff. Further, the issue of PMAP measurements should not be addressed in an arbitration with an individual CLEC.	Open except as to (d).

ISSUE NO.	ISSUE DESCRIPTION	ITC^DELTACOM POSITION	BELLSOUTH POSITION	ISSUE STATUS
3	**Advance Notice of Changes to Resold Offerings** (GTC – Section 20.3): a) Should BellSouth provide advance notice of changes to resale offerings? If so, how much advance notice should be given?			Closed
4	**Tax Liability** (GTC – Section 13.1): Should language covering tax liability be included in the interconnection agreement and, if so, should that language simply state that each party is responsible for its tax liability?			Closed
5	**Access to Pending Order Information and Status of Order Information** (Attachment 6 – Sections 1.5.1 and 4.3): a) Should BellSouth be required to provide the same amount of pending order service detail to DeltaCom that BellSouth provides to its retail representatives? b) Should BellSouth be required to provide information regarding the status of an order to DeltaCom to the same degree as that it provides to its retail representatives?			Closed.

ISSUE NO.	ISSUE DESCRIPTION	ITC^DELTACOM POSITION	BELLSOUTH POSITION	ISSUE STATUS
6	**Facility Check Information** (Attachment 6 – Sections 1.7 and 4.4): Should BellSouth be required to provide to DeltaCom facility check information electronically in the same manner it does to BellSouth's retail operations?	Yes. This is a pure quality of service issue. BellSouth is providing such information already in some states. BellSouth will not agree to do so in other states unless it is ordered to do so by the other state commissions. Consumers in Alabama deserve the same quality of service as that provided in other states. Facility check information allows ITC^DeltaCom to provide quality service to consumers.	Arbitration is not the appropriate forum for the resolution of this issue. This issue involves process and systems changes that affect all CLECs on a regional basis and should be addressed in the CCP. Further, BellSouth does not validate facilities availability for its retail operations at the point of order negotiation with its end-user customer. Despite the ordered implementation of this functionality in Florida and Tennessee Service Quality Measurement hearings, impacted SQMs were initially based upon returning an FOC prior to facilities check. A change in functionality would also require a consideration for how the impacted measurements should be defined – an issue more properly placed in an SQM hearing.	Open
7	**Addition of Call Forwarding** (Attachment 6 – Section 5.1.2): Should BellSouth be required to temporarily provide features on the same terms and conditions as that it provides to its retail customers?			Closed

ISSUE NO.	ISSUE DESCRIPTION	ITC^DELTACOM POSITION	BELLSOUTH POSITION	ISSUE STATUS
8	**Universal or Integrated Digital Loop Carrier ("UDLC/IDLC") Technology** (Attachment 2 – Section 3.1): a) Should BellSouth be required to provide an unbundled loop using IDLC technology to DeltaCom which will allow DeltaCom to provide consumers the same quality of service (i.e., no additional analog to digital conversions) as that offered by BellSouth to its customers? If so, under what rates, terms and conditions should it be provided? b) Should BellSouth be required to provide an unbundled loop using UDLC technology to DeltaCom? If so, under what rates, terms and conditions should it be provided?	a) Yes. IDLC technology is required to allow ITC^DeltaCom to provide the same quality of service to ITC^DeltaCom customers as that delivered by BellSouth to its customers. Both Alabama and Tennessee require the same quality of service, meaning no additional analog to digital conversions is necessary. It is not important how many alternatives are offered by Bellsouth if none provide service at parity. ITC^DeltaCom proposed compromise language. This is a Consumer quality of service issue. b) Closed	a) Loops provided over IDLC are integrated into BellSouth's switch. Therefore, when a CLEC obtains a customer currently served by IDLC, it is necessary to provide a non-integrated facility to serve the customer. BellSouth has eight (8) alternatives for providing this non-integrated unbundled loop facility that are currently used by BellSouth when it is necessary to convert an IDLC loop to an unbundled loop facility. If DeltaCom wants a loop with particular transmission standards (other than voice grade), it should order such a loop or place a New Business Request (NBR) with BellSouth.	Closed
9	**OSS Interfaces** (Attachment 6 – Section 3.2): Should BellSouth be required to provide interfaces for OSS to DeltaCom which have functions equal to that provided by BellSouth to BellSouth's retail division?	Yes. It is a requirement of the Telecom Act that OSS be nondiscriminatory. The favorable 271 decision should make it more clear that non-discrimination language should be in the agreement. It certainly does not preclude ITC^DeltaCom from seeking OSS that accommodates changes in technology and markets.	The FCC and the nine state regulatory authorities for BellSouth's region have ruled in all of BellSouth's 271 applications that BellSouth provides nondiscriminatory access to its OSS for performing the functions of pre-ordering, ordering, provisioning, maintenance and repair, and billing. To the extent DeltaCom seeks some modification to BellSouth's regional OSS, the appropriate forum is the CCP - not an individual interconnect agreement arbitration. Further, BellSouth believes that the current language contained in the Interconnection Agreement Sections 1.2 and 3.2 adequately states what BellSouth provides regarding interfaces to OSS.	Open
10	**Completion Notifier** (Attachment 6 – Section 4.2): Should BellSouth be required to provide DeltaCom a completion notifier?			Closed

ISSUE NO.	ISSUE DESCRIPTION	ITC^DELTACOM POSITION	BELLSOUTH POSITION	ISSUE STATUS
11	**Access to UNEs** (Attachment 2 – Sections 1.1, 1.4 and 1.10): a) Should the interconnection agreement specify that the rates, terms and conditions of the network elements and combinations of network elements are compliant with state and federal rules and regulations? b) Should all network elements be delivered to DeltaCom's collocation arrangement? c) What standards should apply to network elements?	a) Several states retain authority to establish UNEs. This agreement must be approved by state commissions and therefore must compliant with state orders and regulations. ITC^DeltaCom does not seek anything inconsistent with the Act. The Act allows inclusion of UNEs as long as it is done so in a manner that is not inconsistent with the Act. b) No. In fact, ITC^DeltaCom has network elements today that are not delivered to a collocation site. c) Closed	a) BellSouth contends that the interconnection agreement should specify that the rates, terms and conditions of network elements and combinations of network elements should be compliant with federal and state rules pursuant to Section 251 of The Act. The Interconnection Agreement is an agreement under Section 251. If a state commission orders BellSouth to provide access to network elements pursuant to any authority other than Section 251 (for example under a separate state statutory authority) those elements should not be required to be included in a Section 251 agreement. b) Not all UNEs terminate to a CLEC's collocation space, such as subloops. BellSouth's proposed language delineates those elements that do not terminate at the collocation space.	Open as to subparts (a) only.
12	**Reciprocity of UNE Services and Conditions** (Attachment 2 – Section 1.3; Attachment 3 – Section 1.3): Should the interconnection agreement refer to both BellSouth and DeltaCom tariffs?			Closed
13	**Testing of UNEs** (Attachment 6 – Section 4.6.23): a) Should BellSouth be required to provide UNE testing results to DeltaCom? b) How long should the parties have to perform cooperative testing once a request is received from the other party?	a) Closed b) Yes. This language is in the parties' current interconnection agreement. Testing is critical to consumer service. The commission previously approved the agreement with the testing language sought by ITC^DeltaCom.	b) Cooperative testing can be requested by DeltaCom, and it will be scheduled by BellSouth on a first come first serve basis. Tests will be conducted as soon as practical after the request is received, in a nondiscriminatory manner. To require DeltaCom testing to be performed within two (2) hours could potentially result in BellSouth discriminating against a CLEC that asked for cooperative testing earlier than DeltaCom.	Closed

ISSUE NO.	ISSUE DESCRIPTION	ITC^DELTACOM POSITION	BELLSOUTH POSITION	ISSUE STATUS
14	**Prohibition of Use of UNEs to Provide Wireless Service** (Attachment 2 – Section 1.5): Should the interconnection agreement prohibit the use of UNEs to provide wireless telecommunications services?			Closed
15	**DADAS** (Attachment 2 – Section 13.6.1): Should the rates, terms and conditions for DADAS be included in the interconnection agreement?			Closed
16	**Does Inside Wire Include Both Wire Owned and Controlled by BellSouth** (Attachment 2 – Section 2.2.1): Should BellSouth be required to provide access to inside wire that is owned and/or controlled by BellSouth?			Closed
17	**Provisioning and Cutovers** (Attachment 2 – Section 3.7): What terms and conditions should apply to provisioning and cutovers?			Closed

ISSUE NO.	ISSUE DESCRIPTION	ITC^DELTACOM POSITION	BELLSOUTH POSITION	ISSUE STATUS
18	**Testing of NXXs. Call Forwarding Variable and Remote Access to Call Forwarding Variable** (Attachment 2 – Section 9.2.5.1; Attachment 6 – Section XX): a) Should DeltaCom be allowed to use the call forwarding, call forwarding variable, and remote access to call forwarding variable for testing whether NXXs are being correctly translated in the BellSouth network? b) If so, what rates should apply?			Closed
19	**Unbundled Remote Call Forwarding ("URCF")** (Attachment 2 – Section 9.2.5.1.3): Should the interconnection agreement include language that URCF will not be used to forward calls to another URCF or "similar service"?			Closed
20	SS7 (Attachment 2 – Section 16.1.3.2): a) Should BellSouth provide the option of a high speed link for SS7? b) Where should the parties' interconnection point be for the exchange of SS7 traffic?	a) Closed b) Yes. This issue regards SPOI (Point of Interconnection with Signaling services). ITC^DeltaCom is willing to have a single interconnection point in the BellSouth network for each STP pair and incur the cost from that meet point back to ITC^DeltaCom's STPs. By meeting at the central office in the ITC^DeltaCom serving wire center, the parties mutually share transport facilities.	b) BellSouth will meet DeltaCom at established SS7 gateways consistent with the manner BellSouth does for all other customers. BellSouth should not be required to absorb DeltaCom's transport costs.	Closed

ISSUE NO.	ISSUE DESCRIPTION	ITC^DELTACOM POSITION	BELLSOUTH POSITION	ISSUE STATUS
21	**Dark Fiber Availability** (Attachment 2 – Section 8.1.1): Does BellSouth have to make available to DeltaCom dark fiber loops and transport at any technically feasible point?	Yes. BellSouth wants to require ITC^DeltaCom to pick up dark fiber loops only at the ITC^DeltaCom collocation site. In fact, the parties meet in locations other than a collocation site. It is technically feasible for BellSouth to make dark fiber loops available at other locations. The law requires the interconnection at any technically feasible point. Previously, the APSC approved Interconnection Agreements that include the language offered by ITC^DeltaCom. BellSouth seeks a change in policy. At a minimum the agreement should reflect current practices of the parties on this issue.	BellSouth's definitions of dark fiber comport with the definitions of loops and transport under the FCC's rules. BellSouth will make dark fiber loops available at DeltaCom collocations. DeltaCom apparently wishes to access dark fiber at points other than those specified by the FCC's rules. BellSouth believes it has no requirement to do so.	Open
22	**Dark Fiber Parity** (Attachment 2 – Section 8.2.1): Whether BellSouth should provide dark fiber to DeltaCom under the same terms and conditions that it provides to itself?			Closed
23	**Dark Fiber Holding Period** (Attachment 2 – Section 8.2.4): Should BellSouth hold the dark fiber for DeltaCom after receiving a valid, error-free LSR? If so, for how long?			Closed

ISSUE NO.	ISSUE DESCRIPTION	ITC^DELTACOM POSITION	BELLSOUTH POSITION	ISSUE STATUS
24	**Rate and Provision of Performance Data** (Attachment 2 – Sections 9.1.4.15 and 11.3.2.3): a) Should BellSouth be required to provide performance data for end-user customer line, traffic characteristics and common (shared) transport? If so, should BellSouth be required to provide performance data on BellSouth's common (shared) transport when DeltaCom traffic is routed through it? b) If required to provide such performance data, what rate should BellSouth charge DeltaCom for the performance data?			Closed

ISSUE NO.	ISSUE DESCRIPTION	ITC^DELTACOM POSITION	BELLSOUTH POSITION	ISSUE STATUS
25	**Provision of ADSL Where DeltaCom is the UNE-P Local Provider** (Attachment 2 – Section 8.4): Should BellSouth continue providing an end-user with ADSL service where DeltaCom provides UNE-P local service to that same end user on the same line?	Yes. ITC^DeltaCom has received consumer complaints that the consumer can't take ITC^DeltaCom voice service because if he or she does, BellSouth disconnects the consumer's ADSL service. Technical feasibility is not an issue. This is an anticompetitive tying arrangement. ITC^DeltaCom has offered to BellSouth access to the loop without charge so as not to disrupt consumer service. BellSouth refuses such access because it desires to make competitive choice less convenient and thus stifle competition.	BellSouth's policy is that it provides DSL and FastAccess® ("FastAccess") on BellSouth provided exchange line facilities. A UNE-P line is not a BellSouth-provided facility (i.e., the CLEC owns the entire loop); thus, BellSouth does not have access to the high frequency portion of the loop ("HFPL") and lacks permission to provision DSL over this portion of the CLEC loop. The Commission has no jurisdiction under either federal or state law to address this issue. As a matter of federal law, BellSouth's wholesale DSL service is subject to the exclusive jurisdiction of the FCC, and BellSouth's FCC tariff states that BellSouth's provision of DSL requires the existence of an "in-service, Telephone Company [i.e., BellSouth] provided exchange line facility." F.C.C. Tariff No. 1, Section 7.2.17(A). A UNE loop is not an "in-service [BellSouth] provided exchange line facility." Moreover, the FCC recently addressed BellSouth's practice of not providing its federally-tarriffed wholesale DSL service over a UNE loop in its Order addressing BellSouth's Georgia and Louisiana 271 applications. *See* Memorandum Opinion and Order, *In re Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., And BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services In Georgia and Louisiana*, Docket No. 02-35 (May 15, 2002). In considering claims of discrimination, the FCC responded, "[w]e reject these claims because, under our rules, the incumbent LEC has no obligation to provide DSL service over the competitive LEC's leased facilities." *Id.* at ¶157 (emphasis added). Furthermore, many databases would need to be created to track which CLECs are allowing BellSouth to use their HFPL, for which states, at what cost, and for which end users. Additionally, many system enhancements would need to be designed and implemented to ensure BellSouth's current systems would be able to interface with these databases.	Open

ISSUE NO.	ISSUE DESCRIPTION	ITC^DELTACOM POSITION	BELLSOUTH POSITION	ISSUE STATUS
26	**Local Switching – Line Cap and Other Restrictions** (Attachment 2 – Sections 9.1.3.2 and 9.1.2): a) Is the line cap on local switching in certain designated MSAs only for a particular customer at a particular location? b) Should the Agreement include language that prevents BellSouth from imposing restrictions on DeltaCom's use of local switching? c) Is BellSouth required to provide local switching at market rates where BellSouth is not required to provide local switching as a UNE? If so, what should be the market rate?	a) The existing contract language states that the four-line cap only applies to a single physical end user location with four or more DSO equivalent lines. b) Yes. This language is in other carrier agreements and is in the parties' current interconnection agreement. c-d) This issue is subject to the provisions of the FCC Triennial Review order and the findings of the Commission in the impairment analysis prescribed by the order. To the extent BellSouth is allowed to price a service at market rates, those rates must be approved by the Commission and supported by relevant market data and analysis.	a) When a particular customer has four or more lines within a specific geographic area, even if those lines are spread over multiple locations, BellSouth is not obligated to provide unbundled local circuit switching as long as the other criteria in FCC Rule 51.319(c)(2) are met. b) The FCC's rules set forth the situations in which DeltaCom is entitled to obtain unbundled local switching from BellSouth at TELRIC rates. In those situations in which the FCC's rules do not entitle DeltaCom to obtain unbundled switching from BellSouth at TELRIC rates, BellSouth is willing to provide unbundled switching to DeltaCom and other CLECs at market rates. c) The FCC's rules set forth the situations in which DeltaCom is entitled to obtain unbundled local switching from BellSouth at TELRIC rates. In those situations in which the FCC's rules do not entitle DeltaCom to obtain unbundled switching from BellSouth at TELRIC rates, BellSouth is willing to provide unbundled switching to DeltaCom and other CLECs at market rates. Nothing in the 1996 Act authorizes the Commission to establish market rates in these circumstances – instead, the competitive marketplace dictates such rates just as it dictates rates in any other competitive environment.	Closed
27	**Treatment of Traffic Associated with Unbundled Local Switching but Using DeltaCom's CIC** (Attachment 2 – Section 9.1.7): Should calls originated by a DeltaCom end-user or BellSouth end-user and terminated to either DeltaCom or BellSouth be treated as local if the call originates and terminates within the LATA?	Yes. The parties' existing interconnection agreement provides that the LATA is local. Most of ITC^DeltaCom's existing local products are based on this definition. ITC^DeltaCom will be forced to discontinue these existing products if the definition is changed. Any change to the existing definition of "local" would create substantial operational problems and expense and would be disruptive and confusing to consumers.	DeltaCom wants BellSouth to treat calls identified with DeltaCom's CIC code as local traffic if the calls originate and terminate within the LATA. BellSouth does not agree to this request. Calls using DeltaCom's CIC (i.e., calls which cross BellSouth's local calling area boundaries) are appropriately treated as toll calls. If these calls are within the LATA, they are treated as intraLATA toll calls; otherwise, they are treated as interLATA toll calls.	Closed

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28	**Local Switching** (Attachment 2 – Sections 9.1.3 through 9.1.63): What local switching provisions should be in the interconnection agreement?			Closed.
29	**AIN Triggers** (Attachment 2 – Section 9.1.4.16): Should BellSouth be required to offer AIN triggers on a stand-alone basis via DeltaCom's STPS?			Closed
30	**Provision of Combinations** (Attachment 2 – Sections 1.3 and 1.7): a) What terms and conditions should apply to the provision of UNE combinations? b) Should BellSouth be required to provide DeltaCom the same conditions for network elements and combinations that BellSouth has provided to other carriers?	ITC^DeltaCom seeks language similar to that contained in other interconnection agreements in order to not be placed at a competitive disadvantage. Despite regulatory and judicial rulings to the contrary, BellSouth clings to the assertion that UNE combinations may not be ordered.	a) At the CLEC's request and subject to the terms and conditions set forth herein, BellSouth shall provide access to Currently Combined, and Ordinarily Combined combinations of port and loop unbundled network elements and loop and transport unbundled network elements, (hereinafter referred to as Enhanced Extended Links or "EELs"). BellSouth shall also provide access to Not Typically Combined combinations. Currently Combined, Ordinarily Combined and Not Typically Combined shall have the meaning set forth below. • Currently Combined network element combinations shall mean that such unbundled network elements are in fact already combined by BellSouth in the BellSouth network to provide telecommunications service to a particular location. • Ordinarily Combined network element combinations shall mean that such unbundled network elements are combined by BellSouth in the BellSouth network in the manner in which they are typically combined even if the particular elements being ordered are not actually physically connected at the time the order is placed. • Not Typically Combined unbundled network	Deferred Parties agreed to continue existing arrangements pending issuance of FCC Triennial Review Order.

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			element combinations shall mean that such network elements are neither Currently Combined nor Ordinarily Combined as these terms are defined above. In compliance with FCC Rule 51.315(d), requests for combinations of Not Typically Combined unbundled network elements are available through the bona fide request process. b) Pursuant to 47 USC § 2252(i), DeltaCom can adopt rates, terms and conditions for network elements, services, and interconnection from an interconnection agreement filed and approved pursuant to 47 USC § 252, under the same terms and conditions as the original Interconnection Agreement. DeltaCom has not requested of BellSouth to adopt any language for UNE Combinations from an agreement filed and approved by the Alabama Commission.	
31	**EELs** (Attachment 2 – Sections 10.2 and 10.3): Are new EELs ordered by DeltaCom subject to local use restrictions?	No, under the existing FCC rules and orders.	Yes. The Supplemental Order Clarification (FCC 00-183) is not limited in its applicability to only existing EELs. The policy behind these restrictions was to avoid the supplanting of special access by EELs, which is equally applicable to newly requested EELs.	Deferred Parties agreed to continue existing arrangements pending issuance of FCC Triennial Review Order.

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32	**Availability of EELs** (Attachment 2): Should EELs be available everywhere?			Deferred Parties agreed to continue existing arrangements pending issuance of FCC Triennial Review Order.
33	**Special Access Conversions to EELs** (Attachment 2 – Section 10.3.1): Can DeltaCom provide a blanket certification that refers to all three safe harbors for special access conversions?	Yes. Under the current contract, ITC^DeltaCom was permitted to provide a blanket certification. In some cases the conversion can fall under more than one safe harbor. ITC^DeltaCom should be able to use the other safe harbors, if applicable.	No. The Supplemental Order Clarification (FCC 00-183) clearly requires that a requesting carrier provide certification of which circumstance it meets. Each circumstance has a separate certification requirement. Paragraph 29 of the Order states that "the letter should indicate under what local usage option the requesting carrier seeks to qualify".	Deferred Parties agreed to continue existing arrangements pending issuance of FCC Triennial Review Order.
34	**Audits** (Attachment 2): Under what circumstances would DeltaCom be required to reimburse BellSouth for the full cost of an audit?	A determination of appropriate language for this issue must be deferred pending issuance of the FCC Triennial Order. Until that time, existing language can be used.	The Supplemental Order Clarification (FCC 00-183, Para. 31) requires that the CLEC reimburse the incumbent if the audit uncovers non-compliance with the local usage options.	Deferred Parties agreed to continue existing arrangements pending issuance of FCC Triennial Review Order.

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35	**Conversion of DS3 Special Access to EELs** (Attachment 2): Should a "switch-as-is" non-recurring charge apply to conversions of special access DS3s to EELs as opposed to a non-recurring charge that is the sum of the elements?			Closed
36	**UNE/Special Access Combinations** (Attachment 2 – Sections 10.7 and 10.9.1): a) Should DeltaCom be able to connect UNE loops to special access transport? b) Does BellSouth combine special access services with UNEs for other CLECs?	a) Yes. The parties' current interconnection agreement, which was approved by this Commission, provides for this combination and it is in other interconnection agreements. b) In various circumstances, ITC^DeltaCom has had special access services in combination with UNE services.	a) No. The FCC Rules regarding combinations (47 C.F.R. 51.315) relate to combinations of UNEs. It contains no requirements for an ILEC to combine UNEs with tariffed services. Further, paragraph 28 of the June 2, 2000 Supplemental Order Clarification addressed this issue in rejecting MCI's request to eliminate the prohibition on co-mingling. This issue is being addressed by the FCC in its Triennial Review. b) No.	Open
37	**Conversion of a Special Access Loop to a UNE Loop that Terminates to DeltaCom's Collocation** (Attachment 2): Where DeltaCom has a special access loop that goes to DeltaCom's collocation space, can that special access loop be converted to a UNE loop?	In some instances, ITC^DeltaCom has a Special Access loop that goes to ITC^DeltaCom's collocation. This is not a combination. The AT&T/BellSouth agreement provides that in such instances the special access loop can be converted to a UNE loop. ITC^DeltaCom has requested the same treatment. ITC^DeltaCom should be offered the same process.	No. BellSouth is not obligated to "convert" a special access loop to a UNE loop. CLECs may order standalone UNEs in accordance with their interconnection agreements and may chose to roll traffic currently routed over an existing special access circuit to those UNEs. The conversion requirements specified by the FCC in the Supplemental Order Clarification apply only to conversions of special access circuits to loop and transport (EEL) UNE combinations. Neither the FCC Rules regarding combinations nor any FCC Order addresses, either directly or indirectly, conversions of stand-alone elements, which are, by definition, not combinations, but individual elements that terminate in a collocation arrangement.	Open

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38	**Hours of UNE/LCSC Center** (Attachment 2 – Section 2.2.2.3): Should BellSouth be required to maintain UNE/LCSC hours from 8 a.m. to 5 p.m. local time? Must BellSouth finish a cutover once started?			Closed
39	**Definition and Treatment of Local Traffic and Tandem Switching** (Attachment 3): a) Should local traffic be defined as any call that originates and terminates within the LATA, is originated by either a DeltaCom or BellSouth end-user, and is terminated to a DeltaCom or BellSouth end-user? b) Does DeltaCom's switch perform tandem switching?	a) Yes. The current interconnection agreement provides that calls originating and terminating in the same LATA are local. ITC^DeltaCom wants to maintain the existing language in the contract. b) Yes. Under the FCC guidelines, ITC^DeltaCom switch coverage areas are equivalent to the tandem coverage areas of BellSouth and many ITC^DeltaCom switches perform tandem switching functions.	a) For reciprocal compensation purposes, BellSouth proposes that the parties utilize BellSouth's retail local calling area. b) DeltaCom must demonstrate, based on its deployment in each state, whether its switch in that state performs tandem switching.	Closed

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40	**Point of Interconnection ("POI")** (Attachment 3): a) Can DeltaCom select a single POI per LATA? b) If so, should each party pay its own costs to reach that POI within the LATA? c) Should DeltaCom's existing POIs be grandfathered (i.e., not moved to an end office)?	a) Yes. The FCC recently issued an order in an arbitration case in Virginia where it made it clear that the CLEC, not the ILEC, selects the POI and the CLEC only has to have one POI per LATA. b) Yes. c) Yes. ITC^DeltaCom should not be required to move its existing POIs due to the expense and disruption in moving the traffic.	a) The location of the initial POI or interconnection point (IP) in a given LATA shall be established by mutual agreement of the Parties. If the Parties are unable to agree to a mutual initial IP, each Party, as originating Party, shall establish a single IP in the LATA for the delivery of its originated Local Traffic, ISP-bound Traffic and IntraLATA Toll Traffic to the other Party for Call Transport and Termination by the terminating Party. b) No. If DeltaCom interconnects at points within the LATA but outside of BellSouth's local calling area from which traffic originates, DeltaCom should be required to compensate BellSouth for, or otherwise be responsible for, transport beyond the local calling area. c) The existing IPs should be transitioned to be in congruence with the new Agreement language. Further, the arbitration case cited by DeltaCom was specific to the parties involved, outside of BellSouth's service territory, and based on the evidence presented therein and therefore is not applicable.	Closed
41	**Percent Local Facilities ("PLF")** (Attachment 3): Should DeltaCom be required to report a PLF to BellSouth?	No. The reporting and methodology that BellSouth has created called "PLF" is not approved by OBF. Furthermore, no ILEC requires ITC^DeltaCom to report a PLF. This is not a requirement of the existing interconnection agreement.	Yes. The Percent Local Facility Factor, or "PLF", is similar to the PLU factor that is utilized by telecom providers in the industry. The PLF tells BellSouth what portion of the intraLATA facilities purchased by DeltaCom are "Local" (versus intraLATA toll) pursuant to the terms of the interconnection agreement. This determination is necessary for calls to be properly rated as either local or toll.	Closed
42	**Audits of PIU/PLU** (Attachment 3): Should a party have to pay for an audit when their reported factors are more than 20 percentage points overstated?	No. BellSouth should respond to reasonable audit requests as part of its customer service. BellSouth attempts to deter audit requests, especially requests made by small and medium-sized companies.	Yes. BellSouth's position is that the party requesting an audit should be responsible for the costs of the audit, except in the event the audit reveals that either party is found to have overstated the PLU or PIU factors by 20 percentage points or more, in which case the party overstating the PLU/PIU should be required to reimburse the other party for the costs of the audit.	Closed

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43	**Trunk Group Service Request ("TGSR")** (Attachment 3): Should both parties (not just DeltaCom) use the TGSR to order trunks?			Closed
44	**Establishment of Trunk Groups for Operator Services, Emergency Services, and Intercept** (Attachment 3): Should the interconnection agreement set forth the rates, terms and conditions for the establishment of trunk groups for operator services, emergency services, and intercept?	Yes. ITC^DeltaCom has its own operator/DA center and must be able to interconnect its TOPS platform with BellSouth's. ITC^DeltaCom is connected today and this mutually benefits BellSouth's operator services center as well as ITC^DeltaCom.	No. These services are no longer UNEs and are therefore provided under the access tariff, not the Agreement.	Open
45	**Switched Access Charges Applicable to BellSouth** (Attachment 3 – Section 9.2): Should DeltaCom be able to charge BellSouth switched access charges where BellSouth is the interexchange carrier?	Yes. The interconnection agreement should be reciprocal. Especially after 271 approval, the BST/BSLD dichotomy is fictional. Indeed BellSouth may provide interLATA service during the term of this agreement.	No. BellSouth Long Distance (BSLD), not BellSouth Telecommunications, is the authorized interexchange carrier. Therefore, BellSouth Telecommunications should not be required to pay switched access charges to DeltaCom. Instead, DeltaCom and BSLD should negotiate the appropriate terms and conditions for the payment of switched access charges.	Closed
46	**BLV/BLVI** (Attachment 3): Does BellSouth have to provide BLV/BLVI to DeltaCom? If so, what should be the rates, terms and conditions?	ITC^DeltaCom has proposed language that is in the parties' current interconnection agreement. That arrangement was previously approved by this Commission. Unlike other CLECs, ITC^DeltaCom has its own operator/DA center and must be able to interconnect with BellSouth.	BellSouth will provide BLV/BLVI in a nondiscriminatory manner and at parity with how it provides such functionality to its retail customers. BLV/BLVI are tariffed services, not UNEs, and are, therefore, not appropriate issues of a §251 arbitration. Should DeltaCom wish to avail itself of this offering, it can obtain BLV and BLVI pursuant to the rates, terms and conditions in BellSouth's applicable tariff.	Open
47	**Compensation for the Use of DeltaCom's Collocation Space ("Reverse Collocation")** (Attachment 4): Should BellSouth be required to compensate DeltaCom when BellSouth collocates in DeltaCom's	Yes. This is contained in existing interconnection agreement language. The same rates, terms and conditions that BellSouth applies to ITC^DeltaCom in this situation should also be applied to BellSouth when it collocates in ITC^DeltaCom's	The 1996 Act does not include a requirement that DeltaCom permit collocation of BellSouth's equipment in DeltaCom's central offices; consequently, the rates terms and conditions under which BellSouth elects to collocate in DeltaCom's central offices should not be the subject of a Section 252 arbitration. Additionally, any such rates, terms and conditions should not be included in an	Open

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	collocation space? If so, should the same rates, terms and conditions apply to BellSouth that BellSouth applies to DeltaCom?	collocation space.	interconnection agreement between the parties, and made a public record, just as DeltaCom is not required to publicly file any other agreement that it has permitting collocation by another carrier. For sites established after the effective date of the new collocation agreement ("future sites"), BellSouth will agree to pay mutually negotiated collocation charges for BellSouth equipment located, and used, solely for purposes of delivery of BellSouth's originated traffic, if and only if BellSouth voluntarily chooses to place a POI for BellSouth's originated Local Interconnection traffic in DeltaCom's office. Situations where DeltaCom has chosen the DeltaCom office as the POI for DeltaCom's originated traffic, and where BellSouth has to place equipment in order to receive such traffic, will NOT be deemed to be locations where BellSouth has voluntarily chosen to place a POI for BellSouth originated Local Interconnection traffic. Further, if DeltaCom has the right under the Interconnection Agreement to choose the POI for both Parties' originated traffic, and DeltaCom chooses to have a POI for BellSouth originated traffic at a DeltaCom office, such locations will NOT be deemed to be locations where BellSouth has voluntarily chosen to place a POI for BellSouth originated Local Interconnection traffic. The provisions of BellSouth's tariffs will control in the event BellSouth locates equipment in DeltaCom's premises pursuant to such tariffs. BellSouth will agree to have such collocation rates, terms, and conditions mirror the applicable rates, terms and conditions that BellSouth offers to DeltaCom.	
48	**Provision of Terminations in Excess of Capacity of Equipment** (Attachment 4 – Section 5.1.4): Should BellSouth limit the number of terminations?			Closed

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49	**Requirement to Provide List of Entities with an Interest in DeltaCom's Collocation Equipment** (Attachment 4 – Section 5.2): Must DeltaCom provide to BellSouth a list of those entities with a security interest in equipment in DeltaCom's collocation space?			Closed
50	**Subsequent Application Fee and Application Modification** (Attachment 4 – Section 6.3.1): Can BellSouth charge a subsequent application fee and/or other charges when no work is actually required?			Closed
51	**Reciprocity of Charges (OSS Charges, Expedite Charges, "Change in Service Provider or Disconnect Charges", and any other Charges)** (Attachments 1, 5 and 6): a) Is DeltaCom entitled to assess charges to BellSouth for work performed on LSRs sent from BellSouth to DeltaCom (i.e., an OSS charge)? b) Should DeltaCom be able to assess against BellSouth a "Change in Service Provider" charge? c) Should DeltaCom be able to assess charges for work or performance for BellSouth?			Closed

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52	**Sharing of Cost of Facilities for Transit Traffic :** Should BellSouth share 50% of the cost of the interoffice dedicated transport and local channel when BellSouth routes its originating local traffic over the transit trunk group? Should DeltaCom be compensated for common transport and compensation minutes for this traffic?			Closed
53	**Rates and Charges not Ordered by the Commission** (All Rate Sheets; Attachment 6 – Section 6; Attachment 2 – Section 22.3.3): a) Should BellSouth be permitted to impose charges related to UNEs that have not been ordered by the Commission in its recent Order in the generic docket for setting UNE rates? b) Should BellSouth provide rate sheets for its contracts that specifically and separately identify those rates that have been approved by a Commission from those rates that BellSouth is proposing?			Closed
54	**Reimburse Costs to Accommodate Modifications** (Attachment 2 – Section 2.2.2.8): Can BellSouth impose a charge that has not been approved by the Commission for changes to an order after an FOC has been issued?	No. In the interest of compromise, ITC^DeltaCom has proposed language wherein ITC^DeltaCom will reimburse BellSouth if ITC^DeltaCom causes the modification and the cost is not already being recovered. Any such charges should be reciprocal; BellSouth should reimburse ITC^DeltaCom when BellSouth makes modifications.	BellSouth should be entitled to impose order modification charges for design and non-design services pursuant to the FCC tariff. DeltaCom's position on this issue is based on its assertion that the rate for Order Modification Charges is not a Commission-approved rate. This is not correct – the rate is approved as part of BellSouth's FCC tariff.	Closed

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55	**Resend of CFA Fee:** Should DeltaCom pay for BellSouth having to resend a CFA? If so, how much?			Closed
56	**Cancellation Charges:** a) May BellSouth charge a cancellation charge which has not been approved by the Commission? b) Are these cancellation costs already captured in the existing UNE approved rates?	a) No. Cancellation charges have not been approved by the Commission. b) The basis for a separate cost-based cancellation charge has not been established by BellSouth.	a) The rates applicable when a CLEC cancels an LSR are based on Commission-approved rates. When a CLEC cancels an LSR, cancellation charges apply on a prorated basis and are based upon the point within the provisioning process that the CLEC cancels the LSR. Any costs incurred by BellSouth in conjunction with the provisioning of that request will be recovered in accordance with BellSouth's Private Line Tariff or BellSouth's FCC No. 1 Tariff. The cancellation charge equals a percentage of the applicable installation nonrecurring charge. Since the Commission has approved the nonrecurring rates BellSouth charges for UNE installation and provisioning, Bellsouth's recovery of its cost incurred prior to the cancellation of the LSR is appropriate and cost-based. b) These costs are not already recovered in the existing UNE approved rates.	Open
57	**Rates and Charges for Conversion of Customers from Special Access to UNE-based Service** (Attachment 2 – Section 2.3.1.6): a) Should BellSouth be permitted to charge for DeltaCom for converting customers from a special access loop to a UNE loop? b) Should the Agreement address the manner in which the conversion will take place? If so, must the conversion be completed such that there is no disconnect and reconnect (i.e, no outage to the customer)?	a) No. This is an administrative change only. The BellSouth and AT&T interconnection agreement permits AT&T to send a spreadsheet with a list of those Special Access circuits to be converted to a UNE loop that goes to a collocation. b) Yes. BellSouth has agreed to this process with AT&T. ITC^DeltaCom should be afforded the same or similar opportunities.	a) Yes. BellSouth is not obligated to "convert" special access circuits to stand-alone UNE loops. As such, it is appropriate for BellSouth to charge DeltaCom for installation and provisioning of the stand-alone UNEs ordered by DeltaCom to replace existing special access circuits. b) No. BellSouth has no process to "convert" stand-alone special access services to stand-alone UNEs. The project management process BellSouth offered in response to a New Business Request ("NBR") to convert special access services to stand-alone UNEs is complex.	Open

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58	**Unilateral Amendments to the Interconnection Agreement** (Attachment 6 – Sections 1.8 and 1.13.2; Attachment 3): a) Should the Interconnection Agreement refer to BellSouth's website address to Guides such as the Jurisdictional Factor Guide? b) Should BellSouth be required to post rates that impact UNE services on its website?	a) No. BellSouth cannot be allowed to unilaterally modify the contract in a manner that could financially or operationally impair ITC^DeltaCom and its customers. b) Yes. ITC^DeltaCom had a service impacting situation where BellSouth modified certain USOCs and it was not clearly communicated that a contract revision was necessary in order to avoid the disruption.	a) Yes. Certain provisions of the Agreement should incorporate by reference various BellSouth documents and publications. This permits BellSouth to, from time to time during the term hereof, change or alter such documents and publications as necessary, for example, to reflect operational changes which do not materially impact the terms of the interconnection agreement. b) No. BellSouth's position is that we are not required to post rates when the carrier notification is posted on the website. The rates are provided to individual CLECs upon amendment, and BellSouth has agreed to provide DeltaCom with an amendment within 30 days of receipt of such a request.	Closed
59	**Payment Due Date** (Attachment 7 – Sections 1.4 and 1.4.1): Should the payment due date begin when BellSouth issues the bill or when DeltaCom receives the bill? How many days should DeltaCom have to pay the bill?	Yes. BellSouth has a history of rendering bills late or in error. ITC^DeltaCom is receiving thousands of invoices from BellSouth and generally the bills are arriving more than seven days after the invoice date. Moreover, ITC^DeltaCom has found numerous errors and received credits from BellSouth in the millions of dollars due to such inaccuracies. ITC^DeltaCom should be permitted at least 30 days from the date of receipt of the bill to review the bill and make payment and/or lodge a dispute regarding the erroneous portion of the bill.	No. Payment should be due by the next bill date. BellSouth invoices DeltaCom every 30 days. To the extent DeltaCom has questions about its bills, BellSouth cooperates with DeltaCom to provide responses in a prompt manner and resolve any issue. It is reasonable for payment to be due before the next bill date.	Open

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60	**Deposits** (Attachment 7 – Section 1.11): a) Should the deposit language be reciprocal? b) Must a party return a deposit after generating a good payment history?	ITC^DeltaCom and BellSouth are in continuing negotiations to resolve this issue. ITC^DeltaCom supports language that is consistent with FCC policy on deposits including the basic principles of reciprocity, non-discrimination, transparency, payment history for timely billed undisputed charges, and third party review.	a) The deposit language should not be reciprocal. BellSouth is not similarly situated with a CLEC provider and, therefore should not be subject to the same creditworthiness and deposit requirements/standards. If BellSouth is buying services from a CLEC provider's tariff, the terms and conditions of such tariff will govern whether BellSouth must pay a deposit. Thus, the interconnection agreement is not an appropriate location for a deposit requirement to be placed upon BellSouth. b) BellSouth should not be required to return a deposit after a CLEC generates a good payment history. Payment history alone is not a measure of credit risk.	Open
61	**Method of Filing Billing Disputes** (Attachment 7 – Section 3.2): Should BellSouth use the same form and procedure for submitting a billing dispute to DeltaCom that BellSouth imposes on DeltaCom?			Closed
62	**Limitation on Back Billing** (Attachment 7 – Section 3.5): Should there be a limit on the parties' ability to back-bill for undercharges? If so, what should be the time limit?	It should be no longer than 90 days. Backbilling charges longer than 90 days is inappropriate between carriers.	BellSouth's limitations for back billing are pursuant to the applicable state's statute of limitation.	Open

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63	**Audits** (Attachment 7): Should the Agreement include language for audits of the parties' billing for services under the interconnection agreement? If so, what should be the terms and conditions?	Yes. ITC^DeltaCom offered the language from AT&T's Interconnection Agreement.	Audits of BellSouth's billing for services under the interconnection agreement are not necessary. Performance measurements addressing the accuracy and timeliness of BellSouth's billing provide sufficient mechanisms for monitoring BellSouth's billing. Inclusion of audit language for billing in the agreement would be duplicative and an unnecessary use of resources. In response to DeltaCom's request to adopt AT&T's language on this issue, adoptions pursuant to 47 USC § 252(i) are limited to network elements, services, and interconnection rates, terms and conditions and do not apply to other aspects of the Interconnection Agreement that are not required pursuant to Section 251. 47 USC § 252(i) only requires an ILEC to make available "any interconnection, service, or network element" under the same terms and conditions as the original Interconnection Agreement.	Open
64	**ADUF**: What terms and conditions should apply to the provision of ADUF records?	ITC^DeltaCom has provided language regarding ADUF. Specifically, ADUF is the Access Daily Usage File. When ITC^DeltaCom buys unbundled local switching, BellSouth provides ITC^DeltaCom an ADUF record for the billing of the access charges. ITC^DeltaCom should not be billed for ADUF records associated with local calls.	DeltaCom is asking BellSouth to isolate and provide to them only certain ADUF records. BellSouth is not required to do this. Consistent with the FCC's 271 Orders in BellSouth's states, BellSouth provides competing carriers with complete, accurate, and timely reports on the service usage of their customers in substantially the same manner that BellSouth provides such information to itself. If DeltaCom wants a customized report, it should file a New Business Request.	Open

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65	**Notification of Changes to OSS and Changes of Business Rules/Practices** (Attachment 6 – Sections 1 and 1.13.2): a) Should BellSouth provide notice via telephone or e-mail when there are going to be changes to OSS with less than 60 days advance notice? b) Should BellSouth be required to provide notice 60 days in advance of deployment of OSS changes that would impact DeltaCom?	a) Closed b) Yes. ITC^DeltaCom must have advance notice of changes to OSS and/or business rules or products. ITC^DeltaCom has experienced disruptions where BellSouth has failed to provide such notice. Like BellSouth, ITC^DeltaCom has vendor relationships that require sufficient lead-time to make necessary changes.	b) BellSouth will notify DeltaCom of changes to ordering and pre-ordering interfaces and business rules via the appropriate BellSouth website 30-days prior to such changes. BellSouth will provide DeltaCom with a list of postings to the website on a daily basis.	Closed.
66	**Testing of End-User Data** (Attachment 6 – Section 1.3): Should BellSouth provide testing of DeltaCom end-user data? If so, what are the rates, terms, and conditions for such testing?	Yes. A set of test cases with controlled data is required. BellSouth's retail operation is able to test its code prior to deployment and see the results in ordering, provisioning, maintenance and billing venues. ITC^DeltaCom should have parity.	Arbitration is not the appropriate forum for the resolution of this issue. This issue involves process and systems changes that affect all CLECs on a regional basis and should be addressed in the CCP. In addition, BellSouth provides CLECs with access to the two testing environments: the traditional testing environment (used where a CLEC is shifting from manual to an electronic environment, or upgrading its electronic interface to a new industry standard) and the CLEC Application Verification Environment ("CAVE"), which allows CLECs to perform optional, functional, and pre-release testing for EDI, TAG, and LENS. These test environments are governed under CCP and were found compliant by the each of the state regulatory authorities in BellSouth's nine-state region as well as the FCC for BellSouth's 271 applications with regard to providing CLECS with a stable test environment.	Open

ISSUE NO.	ISSUE DESCRIPTION	ITC^DELTACOM POSITION	BELLSOUTH POSITION	ISSUE STATUS
67	**Availability of OSS Systems** (Attachment 6 – Section 3.3): Should BellSouth be allowed to shut down OSS systems during normal working hours (8 a.m. to 5 p.m.) without notice or consent from DeltaCom?	Under no circumstances should BellSouth shut down ITC^DeltaCom's access to OSS during normal working hours without notice or consent of ITC^DeltaCom. ITC^DeltaCom schedules staff based on published hours of support. When BellSouth takes down all systems during normal business hours, ITC^DeltaCom is paying employees who have no tools to conduct customer transactions with BellSouth.	Arbitration is not the appropriate forum for the resolution of this issue. This issue involves process and systems changes that affect all CLECs on a regional basis and should be addressed in the CCP. In addition, BellSouth provides DeltaCom and all CLECs with OSS system availability times. At certain times these systems are not available due to scheduled maintenance or upgrades. These are normally performed during off peak hours. CLECs are given notice as governed under CCP when OSS systems will not be available during normal availability hours.	Open
68	**Provision of Customer Service Records:** What requirements should apply to the provision of customer service records?			Closed
69	**Inadvertent Transfer of Customers:** Should there be a process to allow a carrier to return a end-user to its preferred provider in situations where the end-user was inadvertently transferred to DeltaCom from BellSouth or to BellSouth from DeltaCom? If so, what should that process be?	Yes. Today, ITC^DeltaCom and the consumer have to be on the line with BellSouth in order to correct the error. BellSouth should re-establish the customer as if the error had occurred within BellSouth's retail division. The customer should not have to re-apply for service, but should simply be reinstated to his or her pre-error condition.	BellSouth's process to return a migrated customer to BellSouth requires a service request from the customer. This process documents that a valid service request is received and properly processed to assure accurate records and inventories are established. Undocumented migration reversals would cause invalid customer records, confusion, and potential customer impacts.	Closed
70	**Reimbursement of Costs for Trouble Analysis and Error Resolution:** Can DeltaCom recover its costs from BellSouth where BellSouth's errors require DeltaCom to do trouble analysis and error resolution? If so, what rates should apply?	Yes. Where BellSouth errors cause ITC^DeltaCom to expend resources to resolve BellSouth-created issues, BellSouth should compensate ITC^DeltaCom for costs incurred.	BellSouth is not responsible for any internal analysis or error resolution performed by DeltaCom. CLECs are responsible to isolate trouble conditions into the BellSouth network prior to issuing a maintenance request. BellSouth processes will resolve any BellSouth maintenance problem identified by a CLEC and, unlike the CLECs, have adequate measures to assure the effectiveness of these processes.	Closed

ISSUE NO.	ISSUE DESCRIPTION	ITC^DELTACOM POSITION	BELLSOUTH POSITION	ISSUE STATUS
71	**Reciprocity of Porting Procedures:** Should the parties utilize the same porting procedures?			Closed

DISSENT, Mark G. Montiel.

I dissent from the Panel's Recommendation to the Commission as to Issue 25: Should BellSouth continue providing an end-user with ADSL service where DeltaCom provides UNE-P local service to that same end user on the same line?

I would recommend that the Commission require BellSouth to provide an end-user with ADSL service where DeltaCom provides UNE-P local service to that same end user on the same line. As conceded, it is technically feasible for BellSouth to provide this service. It is within the Commission's authority to require it. Moreover, permitting BellSouth to refuse this service would be against the interest of competition and consumer choice, contrary to the requirements of the 1996 Act.

The Alabama Public Service Commission has previously taken this position before the Federal Communications Commission.[1] This Commission urged the FCC to deny BellSouth's request for a declaratory ruling that state commissions may not require BellSouth to provide broadband internet services to CLEC voice customers. The Commission commented that allowing BellSouth to engage in this practice is not in the interest of competition and consumer choice, but rather would stifle competition in the local service market required by the 1996 Act.

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[1] *See* Appendix 1 to this Dissent, Comments of the Alabama Public Service Commission, filed January 30, 2004 with the Federal Communications Commission pursuant to Public Notice (DA 03-251) In the Matter of BellSouth's Request for Declaratory Ruling That State Commissions May Not Regulate Broadband Internet Access Services By Requiring BellSouth to Provide Such Services to CLEC Voice Customers. (WC Docket No. 03-251).

In the same matter before the Federal Communications Commission, the National Association of Regulatory Utility Commissioners also filed Comments urging that BellSouth's request be denied because it is "simply not in the interest of competition and consumer choice."[2] NARUC stated that "[t]here is no question that it is anticompetitive and inconsistent with the goals of the 1996 legislation."[3]

It must also be recognized that four other BellSouth states -- Florida, Kentucky, Louisiana, and Georgia -- have issued decisions requiring BellSouth to cease withholding DSL service to customers who choose a UNE-P carrier for their voice services.[4] Both the Alabama Public Service Commission and NARUC cited these instances as support for their comments to the FCC referenced above.

Furthermore, the United States District Court for the Eastern District of Kentucky upheld that state's public service commission's authority over local competition and specifically affirmed the Kentucky Commission's conclusion that BellSouth's policy of refusing to provide DSL service on CLEC UNE-P lines has a "chilling effect on competition."[5] That court characterized such a requirement

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[2] *See* Appendix 2 to this Dissent, Comments of the National Association of Regulatory Utility Commissioners filed on February 17, 2004 before the Federal Communications Commission In the Matter of BellSouth's Request for Declaratory Ruling That State Commissions May Not Regulate Broadband Internet Access Services By Requiring BellSouth to Provide Such Services to CLEC Voice Customers.

[3] *Id.*

[4] *See* Appendices 1 and 2, Comments of the Alabama Public Service Commission and of NARUC.

as a "modest interconnection-related condition for a local exchange carrier so as to ameliorate a *chilling effect* on competition for local telecommunications."[6] The Recommendation of the majority of the Arbitration Panel on Issue 25 will prevent Alabama consumers from having the same choices based on competition as their neighbors in the adjoining states of Georgia and Florida. I recommend that the Commission reject the majority's recommendation on Issue 25 and adopt the position of this dissent in lieu thereof.

In sum, the 1996 Act requires the encouragement of competition. BellSouth's request, that it be permitted to deny a customer DSL service if that customer does not also subscribe to BellSouth voice service, is plainly anticompetitive. BellSouth DSL customers will be reluctant to change their voice service provider if it necessitates a loss of BellSouth DSL service. BellSouth has acknowledged that it is technically feasible for it to provide DSL service to a customer who does not subscribe to BellSouth voice service. For these reasons, which are consistent with the Comments filed by this Commission and by NARUC with the Federal Communications Commission, consistent with the conclusions of four other BellSouth states, and consistent with the holding of the United States District Court for the Eastern District of Kentucky, I recommend

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[5] *BellSouth Telecommunications, Inc., v. Cinergy Communications Company*, 297 F.Supp.2d 946, 954 (E.D. Ky. 2003).

[6] *Id.* at 953.

that the Commission require BellSouth to continue providing an end-user with ADSL service where DeltaCom provides UNE-P local service to that same end user on the same line.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554

In the Matter of	)	
BellSouth's Request for Declaratory Ruling That State Commissions May Not Regulate Broadband Internet Access Services By Requiring BellSouth to Provide Such Services to CLEC Voice Customers	)	WC Docket No. 03-251

Comments of the
ALABAMA PUBLIC SERVICE COMMISSION

Pursuant to *Public Notice (DA 03-251)* released by the Federal Communications Commission (FCC) on December 16, 2003, the Alabama Public Service Commission (APSC) respectfully submits its comments in response to BellSouth's Request for Declaratory Ruling filed on December 9, 2003.

The Alabama Public Service Commission opposes BellSouth's petition for a Declaratory Ruling that State Commissions may not regulate broadband internet services by requiring BellSouth to provide such services to CLEC voice Customers. The APSC asserts that the State Commissions have the authority and mandate to insure that competitive choices remain available to the local service customers. A state requiring an incumbent local exchange carrier (ILEC) to provide DSL service to customers who chooses to obtain local voice service from another carrier does not impose state

regulation on interstate information services. It protects the ability of consumers to make choices about their local service provider.

The 1996 Telecommunications Act contains numerous provisions protecting and preserving state commission authority to protect local customers. Contrary to BellSouth's claim, the state Commission orders protecting their local customers' rights to choice among local voice carriers violates no federal law or FCC policy.

Four BellSouth states: Florida, Kentucky, Louisiana and Georgia have issued decisions that require BellSouth to cease withholding its FastAccess DSL service to customers who choose a UNE-P carrier for their voice services. The United States Court Eastern District of Kentucky[1] on December 29, 2003, issued its ruling upholding the Kentucky Commission's decision in an arbitration proceeding between BellSouth and Cinergy Communications Company. The opinion maintained that the state commission's authority, under section 252(b) of the 1996 Telecommunications Act, applied to both interstate and intrastate matters, permitting the Kentucky Commission to exert jurisdiction over local competition policy including BellSouth's DSL services. The Court asserted that,

> "The 1996 Act incorporated a "cooperative federalism" whereby federal and state agencies "harmonize" their efforts and federal courts oversee this "partnership"[2] Quite clearly the 1996 Act makes room for state regulations, orders and requirements of state commissions as long as they do not "substantially prevent" implementation of federal statutory requirements. The PSC's order, challenged here by BellSouth, embodies just such a requirement. 47 U.S.C.

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[1] BellSouth Telecommunications, Inc v. Cinergy Communications Company, et al. 2003 U.S. Dist. LEXIS 23976 (E.D. KY)

[2] Michigan Bell, 323 F 3d at352.

> §251(d)(3)(C). It establishes a relatively modest interconnection-related condition for a local exchange carrier so as to ameliorate a chilling effect on competition for local telecommunications regulated by the Commission." (*U.S. District Court Eastern District of Kentucky. Pg 15)*

Granting BellSouth's Request for a Declaratory Ruling is not in the interest of competition and consumer's choice. Customers of BellSouth that have DSL service will be very reluctant to change voice service providers if they cannot continue to use their DSL service. State Commissions are not attempting to regulate Broadband Internet Access. State Commissions are following the requirements of the 1996 Act to open the way for competition in the local service market and provided choices for the consumers. BellSouth's requested Declaratory Ruling will stifle that competition. The Alabama PSC urges the FCC to deny BellSouth's Request for a Declaratory Ruling.

Respectfully submitted,

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Mary Newmeyer
Federal Affairs Adviser

Mary Newmeyer
Alabama Public Service Commission
100 North Union Street, Suite 948
P.O. Box 304260
Montgomery, Alabama 36130
(334-242-2968)
January 30, 2004

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	
BellSouth Telecommunications, Inc. Request for Declaratory Ruling That State Commissions May Not Regulate Broadband Internet Access Services By Requiring BellSouth To Provide Wholesale Or Retail Broadband Service To CLEC UNE Voice Customers	**WC Docket No. 03-251**

COMMENTS OF THE
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

Pursuant to the *Public Notice* released by the Federal Communications Commission (FCC) on December 16, 2003 and December 30, 2003, the National Association of Regulatory Utility Commissioners (NARUC), file comments opposing the December 9, 2003 Emergency Request for Declaratory Ruling filed by BellSouth Telecommunications, Inc. (BellSouth). NARUC also supports generally the comments and arguments filed by its member commissions in this proceeding So far, four States - Florida, Kentucky, Louisiana and Georgia - have issued decisions that require BellSouth to cease withholding its FastAccess DSL service to customers who choose UNE-P carrier for their voice services. Moreover, the United States District Court for the Eastern District of Kentucky, on December 29, 2003, upheld the Kentucky Commission's decision in an arbitration proceeding between BellSouth and Cinergy Communications Company.[1] The opinion maintained the Kentucky Commission's authority to exert jurisdiction over local competition policy including the impact of Bellsouth's DSL service policy on such voice services. Specifically, the Court asserted that:

[1] *BellSouth Telecommunications, Inc v. Cinergy Communications Company, et al.* 2003 U.S. Dist. LEXIS 23976 (E.D. KY).

APPENDIX 2

> The 1996 Act incorporated a "cooperative federalism" whereby federal and state agencies "harmonize" their efforts and federal courts oversee this "partnership" (FN - Michigan Bell, 323 F.3d at 352.) Quite clearly the 1996 Act makes room for state regulations, orders and requirements of state commissions as long as they do not "substantially prevent" implementation of federal statutory requirements."

The Georgia Commission's order, challenged here by BellSouth, embodies just such a requirement. 47 U.S.C. §251(d)(3)(C). It establishes a relatively modest interconnection-related condition for a local exchange carrier so as to ameliorate a chilling effect on competition for local telecommunications regulated by the Commission. (*U.S. District Court Eastern District of Kentucky. Mimeo at 15).* Granting BellSouth's Request for a Declaratory Ruling is simply not in the interest of competition and consumer choice. There is no question that it is anticompetitive and inconsistent with the goals of the 1996 legislation. The records compiled in each State commission's proceeding clearly indicate the chilling impact on customer choice of the BellSouth practice of withholding retail service. Any current BellSouth local phone customers that also have DSL service will be very reluctant to change voice providers if they cannot continue to use their DSL service.[2]

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[2] BellSouth's practice capitalizes on customer avoidance of inconveniences caused by disconnection of its DSL service - including the hassle of "establish[ing] broadband service with a different provider, incur[ring] any connection fees, change[ing] his or her email address, and notify[ing] his or her contacts of that change." *Georgia PSC Order*, No. 11901-U, at 16 (citing Tr. at 25). Such inconveniences create a considerable disincentive to change local service providers. The evidence in Georgia's docket is compelling, suggesting more than 4,900 Georgia customers declined MCI's service because they did not wish to have BellSouth DSL Service disconnected. *See* MCI's Post-Hearing Br., *Complaint of MCImetro Access Transmission Services, LLC and MCI WorldCom Communications, Inc. Against BellSouth Telecommunications, Inc.*, Docket No. 11901-U, at 9 (filed Apr. 29, 2002) (citing Tr. at 38-39, 75). In Kentucky, Cinergy offered voluminous testimony describing crippling affects of this anti-competitive practice. When Cinergy customers call Bell South to ask about DSL service, BellSouth tells the customer that to secure DSL service from BellSouth, he or she must also subscribe to its voice service. (See Heck Direct at 5,9,36; Heck Revised Rebuttal at 25-26) The Florida PSC Staff concluded from witness testimony "that [BellSouth's] practice effectively keeps customers from switching" and that "BellSouth adopt[ed] its practice to keep customers from switching voice service." *Florida PSC Staff Recommendation*, No. 020507-TL, at 45. Testimony in all the State proceedings supports these conclusions. Small business customers, in particular, have been unwilling to consider another voice provider when they believed that switching from BellSouth's service might lead to a disruption in their email communications and Internet access. Many small and medium sized business customers, that lack cable modem access, are locked in with respect to their local service because they have no alternative. BellSouth is the only available broadband provider.

State Commissions are not trying to regulate Broadband Internet Access. State Commissions are following the requirements of the 1996 Act to open the way for competition in the local service market and provide choices for the consumers. BellSouth's requested Declaratory Ruling will stifle that competition.

BellSouth argues that under the 1996 Act's scheme of "cooperative federalism" and preexisting law concerning federal-state jurisdiction over communications services, the FCC has occupied the field and so the States have no authority to regulate the services at issue here. BellSouth is wrong on both counts.[3] Claims that the FCC has exclusive jurisdiction because jurisdictionally mixed services involve in part interstate communications ignore existing precedent. Even before the 1996 Act, that statement was true only for facilities and services used *exclusively* for interstate communications. But the FCC has never had exclusive authority when, as here, services and facilities carry *both* interstate and intrastate communications. *See Louisiana Pub. Serv. Comm 'n v. FCC*, 476 U.S. 355,373-76 (1986); 47 U.S.C. § 152(b). The PSCs have clear and exclusive authority over local telephony and the conditions limiting competition in the service. *See* 47 U.S.C. § 152(b). Sections 251-252, and the 1996 Act more generally, clearly preserve PSC authority to foster local competition in this fashion. *See* 47 U.S.C. § 251 (d)(3) ("Preservation of State access regulations"); *id.* § 252(e)(3) ("Preservation of authority": "nothing in this section shall prohibit a State commission from establishing or enforcing other

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[3] Section 251(d)(3) permits the States to establish regulations that do not conflict with the requirements of section 251, and expressly precludes the FCC from impeding such regulations. This declaration of State authority is express and is not a grant of delegated authority that the FCC can usurp through declaratory ruling by taking action outside of its narrowly-tailored preemption authority contained in section 253(d). Section 251(d)(3) by its terms does not require all State access and interconnection regulations to be coextensive with the FCC's regulations published under section 251. Section 251(d)(3)(C) prevents the States from adopting regulations that would "substantially prevent" the opening of the ILEC's networks to competitive carriers under the Commission's orders. Section 251(d)(3) reveals explicit Congressional intent to preserve State authority to adopt pro-competitive regulations, even where the Commission has not done so. In fact, in the *Iowa Util. Bd v. FCC* (120 F.3d 806) arbitration, the Eighth Circuit Court of Appeals held that section 251 (d)(3) "constrains the FCC authority" to preempt State access and interconnection obligations. If BellSouth's arguments that the Commission "occupies the field" were to be accepted by the Commission under section 251(d)(2), the State authority preserved to "establish access obligations" under the section 251(d)(3) would be null and void.

requirements of State law in its review of an agreement"); *id.* § 261 (b) (preservation of State regulatory powers to fulfill requirements of local competition requirements); *id.* § 261 (c) (no preclusion of State regulation "for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part"); 1996 Act, § 601(c), 110 Stat. at 14 (the 1996 Act "shall not be construed to modify, impair, or supersede Federal, *State*, or local law unless *expressly so provided* in such Act or amendments.") (uncodified note to 47 U.S.C. § 152) (emphasis added); *see also Michigan Bell Tel. Co. v. MFS Intelenet of Mich., Inc.*, 339 F.3d 428 (6th Cir. 2003); *AT&T Communications v. BellSouth Telecomms. Inc.*, 238 F.3d 636, 642 (5th Cir. 2001); *MCI Telecomms. Corp. v. US West Communications*, 204 F.3d 1262, 1266 (9th Cir. 2000); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) (savings clauses are "the best evidence of Congress' preemptive intent"). Even BellSouth does not argue that the Act expressly limits State actions such as the PSC's, and, there is no inconsistency between federal and State requirements that would support a finding of preemption. Moreover, Congress preserved State authority to impose additional regulations that would advance its efforts to optimize the development of the telecommunications market. Consequently, the Act maintains that States are within jurisdiction to establish and enforce regulations that are consistent with the pro-competitive provisions set forth by the Act, including unbundling provisions.

Based on the foregoing discussion, NARUC respectfully requests that the FCC deny the BellSouth Petition.

Respectfully submitted,

James Bradford Ramsay
GENERAL COUNSEL

National Association of Regulatory Utility Commissioners
1101 Vermont Avenue, Suite 200
Washington, DC 20005
202.898.2207

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